Vol. 21 OCTOBER, 1937 No. 3

# Journal
of the
# American Judicature Society

To Promote the Efficient Administration of Justice

Through Cooperation by the American Bar Association
This Journal Is Sent to All Its Members

CONTENTS

American Bar Assoc. Members to Receive This JOURNAL—Announcement by President Vanderbilt—Response by President Baker. 67
The Judicature Society—Its Purposes and Methods ..... 67
Nebraska Bar Integrated by Supreme Court Rule ..... 69
St. Louis Circuit Court Adopts Business Methods ..... 72
The Undue Process of Law—By Judge Van Buren Perry ..... 74
Bar Vitally Concerned With State Government ..... 79
Office of Prosecutor—Some Random Thoughts ..... 81
Pretrial Procedure in France and Germany ..... 83
Profession Dedicated to "Herculean Task"—By President Arthur T. Vanderbilt ..... 84
Forced Retirement of Federal Trial Judges—Judicial Superintendence a Preventative of Faults ..... 86
Wisconsin Method of Procedural Reform ..... 89
Judicial Selection—A Bibliography ..... 92
Bar Association Activities—(Published in Cooperation with Section of Bar Organization Activities) ..... 94

Published Bi-monthly by the American Judicature Society at 120 West Polk St., Chicago, Ill. Entry as second-class matter applied for at the Post Office at Chicago, Ill., under the act of August 24, 1912.
Editorial and Executive Office at the Law School Building
University of Michigan, Ann Arbor
Subscription Price Twenty Cents per Annum—Single Copies Ten Cents

# THE AMERICAN JUDICATURE SOCIETY

**To Promote the Efficient Administration of Justice**

(Incorporated in 1913)

---

Law School, Ann Arbor, Mich.

---

Indexing Service: H. W. Wilson Company


President: NEWTON D. BAKER

Vice-Presidents: FRANK E. ATWOOD, Mo.; SILAS A. HARRIS, O.; VAN BUREN PERRY, S. D.; HENRY B. WALKER, Ind.

Chairman of the Board: OSCAR C. HULL; Secretary-Treasurer: HERBERT HARLEY; WILL SHAFROTH: Ass't Secretary-Treasurer.

## DIRECTORS

*Alabama*
BORDEN BURR

*Arizona*
SAMUEL M. FEGTLEY

*Arkansas*
J. F. LOUGHBOROUGH
GEORGE B. ROSE

*California*
CHARLES A. BEARDSLEY
O. K. CUSHING
JOHN PERRY WOOD

*Colorado*
WILBUR DENIOUS
WILL SHAFROTH
STANLEY T. WALLBANK

*Connecticut*
CHARLES E. CLARK

*Delaware*
C. L. WARD, JR.

*District of Columbia*
CLARENCE N. GOODWIN
ROBERT N. MILLER

*Florida*
KENNETH I. MCKAY
WILLIAM H. ROGERS
GILES PATTERSON

*Georgia*
ROBERT C. ALSTON
E. SMYTHE GAMBRELL

*Idaho*
FRANK MARTIN

*Illinois*
ALBERT KOCOUREK
STEPHEN LOVE
ROBERT W. MILLAR
R. ALLAN STEPHENS
JOHN H. WIGMORE

*Indiana*
HENRY B. WALKER
BERNARD C. GAVIT

*Iowa*
ROLLIN M. PERKINS
JOHN C. PRYOR

*Kansas*
JACOB C. RUPPENTHAL
C. L. HUNT

*Kentucky*
JAMES D. MOCQUOT
RICHARD C. STOLL

*Louisiana*
MONTE LEMANN
WALKER B. SPENCER

*Maryland*
E. H. YOUNG

*Massachusetts*
DUNBAR F. CARPENTER
ROBERT G. DODGE
FRANK W. GRINNELL
ROSCOE POUND

*Michigan*
HENRY M. BATES
CARL V. ESSERY
HERBERT HARLEY
OSCAR C. HULL
BURKE SHARTEL
EDSON R. SUNDERLAND
HENRY C. WALTERS

*Minnesota*
MORRIS B. MITCHELL
ROYAL A. STONE
EDWARD F. WAITE

*Mississippi*
ADAM T. STOVALL

*Missouri*
FRANK P. BARKER
FRANK E. ATWOOD

*Montana*
WALTER AITKEN

*Nebraska*
LINCOLN FROST

*Nevada*
A. L. SCOTT

*New Hampshire*
JOHN R. MCLANE

*New Jersey*
CHARLES L. CARRICK
ARTHUR VANDERBILT

*New Mexico*
CLARENCE M. BOTTS

*New York*
GEORGE H. BOND
JULIUS HENRY COHEN
MOSES H. GROSSMAN
ADOLPH J. RODENBECK
PHILIP J. WICKSER

*North Carolina*
A. B. ANDREWS
JAMES G. MERRIMON

*North Dakota*
A. W. CUPLER
A. M. KVELLO

*Ohio*
GEORGE B. HARRIS
ROBERT B. TUNSTALL
CARL V. WEYGANDT
ROBERT N. WILKIN

*Oklahoma*
EDGAR A. DE MEULES
J. S. LEWIS

*Oregon*
HALL S. LUSK
MACCORMAC SNOW

*Pennsylvania*
JOHN G. BUCHANAN
EDGAR S. MCKAIG
IRA JEWELL WILLIAMS

*Rhode Island*
FRANK L. HINCKLEY

*South Carolina*
A. M. LUMPKIN

*South Dakota*
VAN BUREN PERRY
JOHN H. VOORHEES

*Tennessee*
WALTER P. ARMSTRONG
EARL KING

*Texas*
JOHN H. BICKETT, JR.
JAMES W. MCCLENDON
DAVID A. SIMMONS

*Utah*
GEORGE H. SMITH

*Vermont*
GEORGE B. YOUNG

*Virginia*
JAMES H. CORBITT

*Washington*
EDWARD W. ALLEN
B. H. KIZER

*West Virginia*
CLARENCE E. MARTIN

*Wisconsin*
FRANK T. BOESEL
WILLIAM E. FISHER
CARL B. RIX

JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Vol. 21, No. 3 HERBERT HARLEY, Editor October, 1937

## President Vanderbilt's Announcement to American Bar Association Members

The Board of Governors of the American Bar Association has consummated a plan of cooperation by which the Journal of the American Judicature Society will be furnished for the next twelve months, with no additional charge, to all members of our Association. To each of you I commend the reading and preservation of the numbers of this Journal. The significance of this arrangement for the cause of judicial administration cannot be overestimated.

*Arthur T. Vanderbilt.*

---

## Response by President Newton D. Baker

The action of the Board of Governors of the American Bar Association, consummating the desire of the American Judicature Society through its Journal to be of wide service to the profession, marks a significant date in the activities of the Society. For many years we have prepared and published forward looking articles. To have them come now to the profession through the avenue of the American Bar Association membership is a guaranty of their usefulness.

*Newton D. Baker.*

---

## Purposes and Methods of the Judicature Society

Thanks to the cooperative action taken by the American Bar Association, this issue of the Society's Journal will be received by many lawyers for the first time. For them some explanation of the Society's objectives and methods should be acceptable.

The Society was incorporated in 1913. In 1917 the publication of this Journal was begun. The Journal has been virtually the only means since 1917 for the service which the Society has endeavored to render on behalf of the public and the legal profession.

Organization was prompted in considerable measure by the agitation concerning judicial administration, expressed in the movement for the recall of judges and other restrictive proposals, during previous years. Lawyers now wince under public criticism. Many of them do not realize that there was even more severe condemnation of the profession a generation before. That was

during a period when the profession was not sufficiently cohesive to react to criticism.

The direct impetus came in the form of financial support by a layman, Mr. Charles F. Ruggles, of Manistee, Michigan. After a prolonged survey of conditions he assumed the financing and carried it until 1924. A donation by the late Julius Rosenwald sustained the Journal for two years, since which time the expense has been met through membership dues, appropriations by Northwestern Law School and the Law School of the University of Michigan. In 1934 a campaign for increased membership was begun and application was made to the Carnegie Corporation for aid.

The result in three years has been to increase the Society's membership from about 500 to about 1,500, and by doubling its income to enable it to receive from the Carnegie Corporation the first of five annual installments of $6,000 each. This generous assistance permits the Society to very greatly increase the circulation of its Journal. The cooperative arrangement by which the Journal is to be sent for one year to all members of the American Bar Association affords a select audience for the matter to be published. It also permits of the employment, on part time, of Mr. Will Shafroth, well known to all lawyers for his services to the American Bar Association. He continues his work as adviser to the Council on Legal Education and as secretary of the National Conference of Bar Examiners and compiler of the Annual Review of Legal Education, published by the section on legal education and admission to the bar, of the American Bar Association. His work will henceforth be done at his office in Ann Arbor.

Membership in the Judicature Society involves payment of annual dues of five dollars and sustaining members contribute more.

* * *

The present form of the corporation, adopted in 1929, provides for one hundred directors, whose names, with those of the officers, appear on the second page of this number. The first president of the Society was Mr. Charles E. Hughes, who resigned on being appointed Chief Justice. His successor, Mr. Newton D. Baker, is still president. The Society has enjoyed the confidence and support of many leaders of the profession, and is especially grateful for the services rendered by Mr. Elihu Root and Mr. William H. Taft, which were continued until their decease. The annual meeting of the Society has been held for several years in Washington in conjunction with the meeting of the American Law Institute. The experiment was tried recently of holding a members' meeting during the week of the American Bar Association convention and it was more successful than appeared possible.

The Society was made an affiliate in the American Bar Association constitution last year, and as such is entitled to representation by one member in the House of Delegates.

In the earlier years the Society explored virtually all parts of the administration of justice and produced various bulletins, the more important of which dealt with unification of courts, integration of the bar and model civil procedural rules. The Journal was then resorted to as an inexpensive way of reaching a much larger audience of lawyers. Its circulation has varied between 5,000 and 10,000 copies and with this number it is increased to more than 30,000. Being circulated gratis it was made as large as could be mailed under the third class postal rate for one cent per copy. Application has now been made for the second class rate, which involves a subscription price, placed at twenty cents per annum.

* * *

It is a modest statement to say that the files of the Journal constitute a library on judicial administration. Back numbers are available at ten cents each and an index to the first twenty volumes will soon be available. A large share of the Society's services consists of supplying materials needed by lawyers and their committees.

The Journal conceives its mission to be presentation of as much as possible of ideas and news concerning progress in reform throughout the entire field of judicial administration. This work will be much facilitated by the American Bar Association section on bar organization activities and the judicial section, now expanded under the name of "section on judicial administration."

The founders of the Judicature Society had the choice of undertaking to educate public opinion, or of devoting their work to the upbuilding of the legal profession. The latter choice was made under the conviction that the legal profession could assume its responsibilities to government and to the public when it was sufficiently informed and when it had acquired a larger measure of organization. The Society's publications have been directed toward information and better organization. That there has been such success in the latter field, as evidenced by the progress of the bar integration and coordination movements, is justification for the choice made.

* * *

The attitude of the Society has been that proposals should not be suppressed on the ground that they are too idealistic. On this principle

the projects and drafts for unifying the courts of a state and of large cities, and the perfection of bar integration, however difficult and remote, were submitted. With unexpected fervor bar integration was endorsed by state after state and is obviously destined to become universal throughout the states in a few more years.

As a part of bar integration the Society has persistently advanced the idea of coordinating the work of the American Bar Association with that of all state and local bars, already so far progressed as to open new vistas of professional advancement. When the subject seemed equally unattainable the Society persisted in promoting better modes of selecting judges, and in the past few years there has developed a movement likely to correct the errors which have survived for nearly a century.

In its first judicature draft acts the Society included a judicial council, and from that beginning there has come a movement of constantly increasing momentum, which, with judicial rule-making power, promises to modernize civil procedure and the administration of the courts generally. These are the larger aspects of the Society's work. This article is intended to be description and not laudation, and so no reference is had to a large body of commendatory writings.

It may be necessary to say that the Journal has not devoted much space to reform in criminal procedure; thus, because of the keen interest displayed by other organizations, and more because progress in curbing crime depends more on better judicial and bar organization than on trial rules. It has not found it necessary to devote much space to legal education requirements, a matter already under way when the Society began, and consistently and successfully prosecuted to this time.

The Society has endeavored to present all important news concerning bar organizations and their activities and will expect in future numbers to devote several pages to such a separate department of news. Progress in judicial organization, the activities of judicial councils and the nation-wide modernization of procedure, will be dealt with as fully as possible.

# Nebraska Bar Integrated By Supreme Court Rule

## Without Express Constitutional Allocation Power and Duty as to Bar Inheres in Judiciary—Precedent May Serve Neighbor State Bars

The supreme court of Nebraska has the credit of being the first to recognize its duty in respect to bar organization and to exercise its power by adopting rules which provide an all inclusive association. To Mr. Robert Guinther goes the credit for having first advanced the doctrine now acted upon, in his address as president to the Ohio State Bar Association in 1933.

The new rules were filed September 20, 1937. They were drafted and submitted with a petition filed in June by the State Bar Association. The unanimous opinion of the court, granting the petition, recites the fact that the constitution does not expressly "vest the power to define and regulate the practice of law in any of the three departments of government." An opinion of the Missouri supreme court (State v. Washburn, 167 Mo., 680, 67 S.W. 592) is quoted as follows:

"All governmental powers are in their nature either legislative, executive or judicial. The constitution does not undertake to define what acts fall within the one class or the other, but leaves every act to be classified according to its nature, recognizing that the essentials which distinguish those that belong to one department from those that belong to the two others, are discernible to the learned mind. But in that article of the constitution all the powers of the state government are disposed of, and everyone who exercises any state governmental function is able to trace the source of his authority to one of the three departments there named."

Reference is had also to decisions of like character in Nebraska and other states, and notably to the recent decisions of the Kentucky court of appeals which base the present integrated state bar squarely on the court's rules, made "in deference to" the act of legislature. (In re Sparks, 267 Ky. 93, 101 S.W. [2d] [Ky.] 194. Commonwealth v. Harrington, 266 Ky. 41, 98 S.W. [2d] [Ky.] 53.)

The opinion deserves further quotation:

### Supreme Court Has "Ample Power"

"An attorney owes his first duty to the court. He assumed his obligation to it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests

may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court. . .

"The primary duty of courts is the proper and efficient administration of justice. Attorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of the state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. . .

"While this court has *ample power* to provide for an integrated bar by court rule, the question whether the court should invoke that power for the purpose of integrating the bar of the state is a matter within the sound discretion of the court. . .

"That the courts and lawyers have been subjected to public criticism is common knowledge. That a few unethical practitioners have degraded the public esteem of the bar as a whole is a fact well known to every lawyer. The denunciation of the bar by the public is based on the belief that the bar could purge itself if it would, but that it does not wish to do so. In the past reliance has been placed in the bar associations of the state to accomplish effective corrective results. We have overlooked the fact that the bench and bar are so intimately related that the problems of one are the problems of the other.

### Bar Alone Is Inadequate

"We have come to the conclusion that the bar, of itself, can do little to better the situation. But, with a cooperating bench and bar, it appears to us that a more effective and efficient regulation of the bar would be the result. Under the plan suggested by the petitioners it can be accomplished without invoking any power that this court has not already exercised in the past and without the delegation of any of its judicial functions to any agency of the bar. The matter of the admission, suspension, discipline and disbarment of attorneys still rests in this court, and this court alone. In event of a failure of the plan to function as hoped, it can be corrected or abandoned by the amendment or revocation of the rule by the court in the exercise of its sound judicial discretion. *Most courts in the past have shown a reluctance to act that has contributed to the criticism to which the bar has been subjected.*

"We feel that it is our duty, especially where the request comes from so large a majority of the bar who participated in the referendum on the subject, to consider favorably the adoption of rules providing for the integration of the bar of this state by court rule under the powers lodged in this court by the constitution of this state. The prayer of the petitioners will therefore be granted."

The suggestion for petitioning the supreme court was suggested to the Nebraska Bar Association several years ago by Mr. Justice Goss. The idea of a referendum vote of all practitioners came later. It resulted in a three-fourths approval, indicating favorable opinion by a considerable number of lawyers not association members. The petition was accompanied by draft rules which appear to have been accepted by the court without change.

### Organization Augmented, Not Changed

A notable feature of the rules is that they make virtually no change in the organization which they supplant. It is fortunate that the association had already adopted mail voting for the selection of district members of its executive council. So far as members are concerned the accustomed organization continues; as for non-members, they must conform to the provision for registering within sixty days, either as active or inactive members, the fees being $5 and $1 for the two classes. Inactive members have no vote.

The executive council has six members from as many districts and three at large, the latter to be elected, together with the president and three vice-presidents, at the annual meetings. This feature is used in a few states to encourage attendance at conventions. The secretary-treasurer, as formerly, is the clerk of the supreme court. The rules concerning nomination and election cover every contingency.

In case the Association wishes amendments of rules they may be recommended to the supreme court on a three-fifths vote of the council or a two-thirds vote of members at convention, having first been submitted a year before action.

### Disciplinary Procedure

The provisions for dealing with complaints against members is carefully worked out. The court will appoint in each judicial district a committee of not less than three members. If, after investigation, the committee deems the complaint to be one requiring further action, it shall cause the complaint to be reduced to writing, with specification of facts, and serve a copy on the member complained of, who shall have the right, within twenty days, to file with the committee any matter by way of defense; if the committee still finds reasonable grounds, it shall transmit all documents to the court, taking its final action within ninety days from the filing of the original complaint. "Such complaint shall be made in

the name of the State on the relation of the Nebraska State Bar Association."

The court may take such action as it prefers on any complaint, and may direct a reference to a special master, with power to administer oaths and compel attendance of witnesses, and required to make a report of all evidence adduced, with exhibits, and findings. The court may appoint an attorney to prosecute. No publicity is permitted until the filing of the master's report. The State Bar shall bear all expenses. Provision is also made for presentation of such matters directly to the court by any lawyer who has been complained of in case the committee finds no reasonable ground to believe that the member complained of is guilty, or fails to act within ninety days. This appears to be a salutary provision.

### Integration Movement Accelerated

Copies of the opinion and rules, together with the recently adopted supreme court rules concerning admission, which meet the American Bar Association standard, were circulated by Nebraska lawyers at sessions of the section on bar organization activities held during the American Bar Association convention in Kansas City, and occasioned much comment. There were then present bar association officers from a number of states who had striven to get bar acts from their legislatures, and had failed. The opinion was current that the action taken by the Nebraska supreme court would greatly accelerate the integration movement.

In Iowa and Kansas especially the impact will be felt. The petition now in the hands of the Iowa supreme court is considered likely to be granted, for bar opinion in Iowa is far advanced. In Kansas the supreme court is holding a like petition with the expectation that a majority of the practitioners will before long register opinion favorable to the state association's position. In Colorado also the bar would prefer court rules to legislation. It is obvious that much depends upon the personnel of the court as to the time when it may choose to take a stand, but the constitutional principles apply equally, it is believed, in virtually all states. In some, as in Illinois, previous decisions prevent recourse to legislation.

### Nebraska Lawyers in Enviable Position

While the recently adopted rules give the Nebraska State Bar Association all it has sought, and will greatly augment its power for progressive work, there is far more to the situation than increased power for purging its ranks of unfit members. It becomes allied with the bench in the affirmative work of improving the administration of justice in all respects. Nebraska is already as far advanced as most states in this respect, but it will do well to petition the supreme court to set up a judicial council composed of judges and practitioners, and offer to finance the operations of the council. With the impending reforms in federal practice an opportunity is presented to every state bar organization. Nebraska will not keep abreast of its neighbor, South Dakota, without a judicial council and without complete judicial regulation of procedural rules. All these factors exist in South Dakota, and precedent for the setting up of a council is afforded by the action recently taken in the adjacent state of Iowa by its supreme court, and earlier by the action similarly taken by the Missouri supreme court. The acquisition of rule-making power by the judiciary is a present great need, and it should be accompanied always by the creation of a judicial council or rules committee. The regulation of procedure is as much an inherent power, under most state constitutions, as the inherent power of the judiciary to organize the bar. A clear cut opinion by a supreme court in support of the power to regulate procedure, where no constitutional phrasing is hostile, is greatly needed.

The courts and the profession are held responsible for judicial administration. Without power there can be no genuine responsibility.

---

**Justice and power must be brought together, so that whatever is just may be powerful, and whatever is powerful may be just.—** *Pascal.*

---

**Not only is there a duty resting upon bar associations to improve legal procedure, but there is an obligation to the public, to the court, and to the other members of the bar, resting upon each individual lawyer, to improve methods of practice. This obligation of the individual attorney is not discharged by sitting idly by and permitting others to do the work.—** *Albert Faulconer.*

# St. Louis Court Adopts Business Methods

## Enterprising Clerk Creates Entire New Structure of Administration—Statistical Machines Facilitate Operations

The detailed management of a court's business doubtless appears to most lawyers to be a prosaic matter, if not also a simple one. Probably most readers of this Journal are willing to concede some importance to first-class, efficient management, but still would find the subject even less interesting than one of those long histories of corporation mergers and resources.

It is not so hard to appreciate the efforts of courts of appeal and large trial courts to classify cases and devise means for saving time for lawyers, litigants and judges. But such improvements in administration need as foundation an efficient, systematic and dependable clerk's office, a most unromantic thing.

For these reasons the Editor is gratified to know that the St. Louis Bar Association has shown marked appreciation of recent progress in keeping the records of the circuit court of the city of St. Louis. That the judges should have participated in this work, and have indicated great satisfaction, is to be expected.

An effort will be made to report briefly what has been done. The matter came to the attention of the Journal through a newspaper which told of adoption of a jury pooling system, with a saving of $100,000 a year. This was told in a short article in the Journal (vol. 20, p. 257) and was credited to the St. Louis County circuit court, which is not the court in the City of St. Louis. The dispatch also said that the court had been enabled to try one-third more cases per week, but this, seeming incredible, was not included in the Journal's comment.

The facts are that the court has eighteen judges; that it has greatly increased the volume of trial work, and that this is in part due to the new jury system, and in part to a new system of setting cases for trial, which is a detail of a complete making over of the work of the clerk's office.

The hero of the play is Clerk H. Sam Priest. His report to the judges covering the year 1936 is an astonishing document. It should be studied by judges in all large city courts. In the beginning, and until two or three years ago, there was something resembling chaos. It may be presumed that nobody got any good out of what was called a system except those who failed to pay court fees. The present incumbent in the clerk's office set himself to collecting about $100,000 of unpaid fees, but first had to overhaul the old system of recording and accounting, and devise a new one.

The study began with personal trips to several cities where progress had been reported, and correspondence with judges in other cities. The first year's report (1935) was largely on changes effected; the latest on results attained. It is reported that there has not been a single day in the past two years when files have been requested which could not be found, and older employes say that it has been so for twenty years. There may be only carelessness on the part of lawyers in taking and retaining official files, but in the Chicago Municipal Court, where it was forbidden to take files from the clerk's office, there were so many thefts that it was found to be necessary to keep a policeman constantly watching lawyers who drew files for examination, and even after that there were occasional thefts. In the St. Louis court there were twenty-eight separate departments where files were kept. Now there is but one, and they are checked on continuously.

Early in the new regime an accounting company, after thoroughly investigating the offices, proposed to institute a proper system for a fee of $20,000. The offer was beyond reach, so Clerk Priest set himself to the task. A tedious investigation of the old system proceeded along with the building of a new one, and employes of the clerk's office became so interested that they worked overtime, without pay, to the extent of over 4,000 hours.

"The overlapping and indefiniteness of the duties" of eighty deputies was found to be the cause of much inefficiency. A detailed chart was made with every operation of the office numbered and described. Guesswork prevailed formerly, where now every employe's duty is clear.

### A Practical Jury System

There had been much complaint concerning the assignment of cases and with 15,000 cases awaiting assignment in the assignment division it was uncommon to have the jury trial divisions supplied with cases for more than the first two days of each week. The new system, together with the new jury system, insures steady work in the jury trial rooms and it is reported that any lawyer anxious to have his case heard can get it on a trial call for early hearing. Counsel list

the cases they want tried and from 250 such cards cases entirely ready for trial are put on a week's calendar, and postcard notices are sent to counsel a month in advance.

The jury system was worked out by Mr. P. J. McNamara, jury commissioner, who studied systems in several cities. Formerly those summoned to jury duty were able to ask individual judges to excuse them, and judges found it hard to refuse. Service is for only one week, and one judge now hears requests on the afternoon of the preceding Friday. He has found that impartial enforcement of rules largely overcomes resistance. During eight weeks 2,200 jury summonses were issued, 1,653 were served and 220 were excused, some of them exempt by law. In cases of merchants having no assistants the judge verified the story by sending a deputy to investigate. At the close of each day jurors not needed are excused. In one week reported on by a local newspaper 136 had been relieved before Thursday.

By pooling the jurors, instead of providing each trial room with two panels, a great saving is effected. By drawing names for juries from a wheel just before they are sent to a courtroom there is no advance knowledge of the names. It is reliably reported that formerly counsel in damage suits had the voting of jurors checked on daily, so that they would know who to challenge when their cases were called for trial. The saving of court time finally is seen to be in part the saving of time in qualifying the jury.

### Court Clerk Makes a Record

The clerk has won bar favor by providing a special room wherein counsel may study files, and has also made the custody of files more secure. An information desk has been established to serve all persons who seek information in the offices.

Although the court requires a signed "security for costs" it had failed to collect to an amount estimated at one million dollars. Steps were taken to collect these bills. A very close collection has resulted with only one and one-tenth percent of the bills returned by the sheriff "nulla bona."

When Clerk Priest began his service a number of appeal and other bonds were missing. This hole was plugged by having photostatic copies made so that the original bond remains in the cashier's vault.

### Statistical Machines Adopted

A full account of the innovations and new methods would amount to a duplication of the voluminous 1936 report, and then not be self-explanatory. The most notable thing is that this court, being doubtless the first, has responded to the demands of the machine age by adopting the latest tabulating, accounting and statistical machines, devices without which certain important facts cannot be acquired from a mass of data. Mr. Robert M. Crain, of the St. Louis bar, who has assisted Clerk Priest in his revolutionary work, has explained the matter in a letter, from which the following is quoted:

"Mr. Priest has installed a complete International Business Machine outfit, which contains a list of every case in the assignment division, the names of attorneys for both parties, the types of cases, the dates when filed, whether security for costs have been put up or not, and whether the cases are at issue or not, which information is compiled daily. When the docket clerk prepares a trial docket, he instructs the head of the accounting department to furnish him a list of all cases in the assignment division in which the costs are secured, and which are at issue. A sorting machine, which handles cards at the rate of 440 per minute, then picks out cards of all cases that are at issue and have costs secured. The cards representing such cases are placed in a printing machine which prints a complete list of the cases at issue and in which costs are secured, the number of previous settings and the date of last setting, together with the names of the parties and addresses of the attorneys. The docket clerk takes the list of cases at issue, together with a list of requests for settings for trial, which has been checked up by the accounting department, and prepares a tentative trial docket of 250 cases."

Counsel are then notified and publication of the docket is made in a newspaper. Further:

"The new accounting system enables the clerk to furnish to any attorney at a moment's notice a complete list of the cases which he has pending. . . . A further result of the accounting system has been the ability of the clerk to furnish a large amount of statistical information, which is compiled annually, in accordance with suggestions made by Mr. Carter Atkins, head of the Bureau of Governmental Research of the City of St. Louis, a non-political agency."

The annual report speaks eloquently of the statistical services of the electrical machines. The cards measure about three by seven inches, and can record nearly 500 facts in the forty columns and fifteen lines. Each fact is represented by a punched hole in the card, and the statistical machine will record any desired fact from any number of cards, or any group of facts, in a single operation.

The 1936 report, showing the total number of suits filed by weeks in the past two years, grouped according to the nature of the proceeding or step taken, or nature of the relief sought, reveals

sixty-eight different kinds of orders, which would surprise the average layman, and should inform the lawyer as to the technical nature of a court's proper clerical work.

A report of the judiciary committee of the St. Louis Bar Association to President Samuel H. Liberman, under date of May 3, 1937, goes into considerable detail in commending the numerous improvements made by Jury Commissioner McNamara and Clerk Priest.

On June 19, 1937, Presiding Judge M. G. Baron, transmitted to Clerk Priest the following letter:

"Pursuant to a resolution of the circuit court in general term assembled on Saturday, June 19, 1937, we take pleasure in expressing to you our hearty approval and commendation of your splendid business-like administration of the office of circuit clerk. Our perusal of your last splendid report, and personal observation of the functioning of your office, lead us to conclude that your office is one of the most efficient, if not the most efficient, of its kind in the United States. Assuring you of the fullest cooperation of the court, we wish you continued progress and success."

# The Undue Process of Law*

By Van Buren Perry†

**"Due process should be preserved, to be sure, but it should not be embalmed."**

The title assigned to my talk is the Undue Process of Law. I wish to emphasize the need for progress in procedure and suggest effective methods of achieving the same.

In suggesting improvements in our practice and procedure, I would not be classed as making common cause with those who recently attacked the federal judiciary. I cannot tell you how wholeheartedly I resented and opposed that assault, nor can I express the full measure of my disapproval of the innuendoes, sophistries, the half truths and the untruths employed by those whose high position makes such course doubly reckless and reprehensible. I resent also recent unworthy attacks upon lawyers as a class, and deplore the increased disrespect for law which is the inevitable consequence of such reckless statements. However, these attacks cannot wisely or safely be ignored. We must examine our legal system, throughout, to see what improvements are needed, and see to it that they are made. Upon doing this I find that such improvements as were needed in the federal courts are by way of being immediately supplied by the new federal rules, but that defects and deficiencies do exist in many of the municipal, county, district and other state courts, and these insufficiencies form the basis of much ill-advised popular support for the attacks upon the federal judiciary.

We lawyers may not be wholly responsible for this condition, but we lawyers are the only ones who can cure it. We should give serious, immediate and impartial consideration thereto lest we lose yet more of our business, lest the courts be imperiled, and lest peevish politicians take the whole bar to the whipping post. My criticisms and suggestions are directed only to the state courts, and do not apply to the federal courts; and further, they are being made here in the bosom of the fraternity, not to swell a public discontent.

I am no scoffer at the law; no captious critic; no wild-eyed reformer. I would not venture an attempt to make a peach tree from an oak. I do not ask very much of a new deal.

The sober fact is that the overwhelming majority of people fear and distrust the law and lawyers, and will go to great lengths rather than to resort to us from choice. The press has so greatly overemphasized the rare misconduct of lawyers, and the divergent opinions and claims which it is their duty to advance, that we no longer enjoy the public confidence and trust we once possessed and to which we are still entitled. The average layman is of the opinion that the only sure results of becoming involved with lawyers is that justice, if secured at all, will be long delayed, and that it will cost him plenty. This attitude is bad. It is bad for the nation, bad for the courts, bad for citizens and *very* bad for lawyers.

*An address delivered at the meeting of the Section of Bar Organization Activities, Kansas City, Sept. 28, 1937. Subheads and italics added by Editor. Published on behalf of the Sections on Judicial Administration and Bar Organization Activities, American Bar Association.

†Judge in Fifth Jud. Circuit, S. D., Secretary of S. D. Judicial Council; Secretary of Nat'l Conference of Judicial Councils.

In cases which are thoroughly litigated by able counsel, the courts usually arrive at quite exact justice. In such cases the cost is too often excessive and disproportionate to the benefits received by the litigant, and this without overpaying the lawyer. This same anticipated expense too often bars the poor from the courts, although they may have meritorious and, to them, important causes. Many people who have legitimate claims or defenses which ought to be asserted in court, abandon them and endure loss or injustice because they fear the law and lawyers and the uncertainty, delay, inconvenience, humiliation and expense of litigation. This is unjust to laymen and unprofitable to us. The labor required of lawyers should be reduced for the average case so that reduction in fees would be justified.

The historian Gibbon described the law from the layman's viewpoint as "a mysterious science and a profitable trade." I would not like to admit publicly and in the presence of some of my bar and supreme court that the law holds for me any mystery, but I concede that it does for all laymen, most lawyers and some judges. As for its being a profitable trade, my knowledge is largely hearsay. I am not even concerned with the subject. I leave it to Frank Hogan.

"The law licks up a' " runs the Scotch proverb. and the popular idea finds expression in the story of two thugs who were following a man to rob him, when the intended victim turned into a lawyer's office. "What will we do now?" asked one thug, and the other replied "We'll wait for the lawyer."

I need not dwell further on the delays, technicalities, uncertainties and expense which we can root out if we will. In a V8 age the people are entitled to more than Model T judicial machinery, however much that venerable model may have contributed in the past to the welfare and happiness of the world.

### Due Process Must Grow

For a century and a half we lawyers have been zealous to *preserve* "due process of law" as originally constituted, but have neglected to *provide* the "due process of law" needed for the greatly expanded fields of the law, or to make the adjustments needed because of changed conditions and required to keep the machine working smoothly at proper speed.

Certainty, promptness and efficiency are essential attributes of any process which is due and proper process. When procedure designed to protect a defendant who may be unjustly sued, becomes the tool and means by which every unscrupulous defendant can wear out, delay and defeat a plaintiff with a just cause, do we provide "due process"? Is not a plaintiff entitled to his remedy with out *undue* process of law? "The process of the law is a grievous vexation" said Lord Coke, (Coke, Litt. 289), and this is more true today than ever.

Needed change, if wisely done, is progress, and we must progress or perish. Due process should be *preserved,* to be sure, but it should not be *embalmed.* Again I quote from Coke: "Law is the perfection of reason which commands what is useful and necessary, and forbids the contrary." (Coke, Litt. 319b). Shakespeare warned us

> "We must not make a scarecrow of the law,
> Setting it up to fear the birds of prey,
> And let it keep one shape till custom make it
> Their perch and not their terror."
>
> (Measure for Measure, Act 2 Scene 1)

The failure to face the facts and provide needed and satisfactory remedies lost to the legal profession forever one of the most important fields of litigation—that now embraced in workmen's compensation. I do not like the arbitrary and collective type of cafeteria justice dispensed in this and other administrative fields, but it is certainly more satisfactory to the public than were the evils which we tolerated until an aroused public took this business from us. Unless we wake up, automobile litigation will leave us in the same manner via the doctrine of compulsory insurance and compensation without determination of fault.

How easily we "pass the buck to the legislatures! The courts do not make the substantive law, it is true, but our troubles are almost entirely with procedure, and in that field the courts and lawyers are supreme. This problem child is our child, and we can and should correct it. Nobody else can.

In the proposed rules of federal procedure many needed improvements in practice are provided. Dilatory, fictitious and general pleas are abolished. Attorneys are held to proper responsibility as officers of court. Motions are consolidated and expedited. Joinder of claims, defenses and parties is permitted or required. Sham defenses are made perilous. Summary judgments are authorized. Trials are limited to actual disputes. Needless technicalities are abolished.

### Rule-Making Power as an Implement

*All these things can be done in every state, and by rule of court.* To the state courts with rule making power I suggest: For one year write only memorandum decisions except in the few cases where new law is involved. Let the time

saved in writing opinions be devoted to cooperation with a judicial council in a thorough revision of the rules of practice and procedure. Lawyers have no vested interest in trickery, needless delays and technicalities. Root them out and for formality give us procedure providing justice as quickly, as surely and as economically as possible.

Boldly ignore statutory procedure as legislative usurpation of a right which belongs constitutionally, inherently, impliedly and exclusively in the courts. (Kolkman v People, 300 Pac. 575; People v Callopy 192 N.E. 634) Or, if you feel that you have so long endured the usurpation that the legislature has acquird control of procedure by prescription, get them to give it back. It can be done. We can get along without lengthy opinions for a year. In the matter of precedents appellate courts have been piling Pelion on Olympus and Ossa on Pelion, and we lawyers have to buy the darned "reporters." It would be a relief if for a whole year we had to buy only one volume per set, even though it contained nothing but memorandum decisions. If all the opinions written by all the final courts of all the states for the year 1935—or any other year—were torn out of the books and burned, would the law stop or even falter? Heavens, No!

### Courts Should Look Forward

Too many courts have been looking in the wrong direction, and have regarded the making of more precedent as of more importance than the wise and full exercise of the rule making power to modernize procedure. I do not think that judges lack the vision, energy, ability or courage, if only they can be awakened to the necessity for progress. It is time for the courts to do something more constructive than merely writing opinion. They should actively exercise their superintending powers of control over procedure, to correct its defects and supply its deficiencies.

Why have a judicial council assist in the work? Consider the reason for its being and the effectiveness with which only a council can operate.

As Judge Cardozo pointed out, "The legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterestd or systematic advice as to the workings of one rule or another, patches the fabric here and there and mars often when it would mend. * * * The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning and report the changes needed when function is deranged."

Many judicial councils founded on this thesis have accomplished little. They have "observed" and "reported" and stopped there. Many scientific studies and fine suggestions died aborning. As both Oscar Hull and Arthur Vanderbilt have said "the production department has been good, but the sales department has been weak."

It is the business of a judicial council to see to it that errors and deficiencies in the law and procedure are: first, *detected*, second, *solved*, and third, *corrected* by the enactment of the necessary statutes or rules. Actual correction is the end to be achieved.

### Ideal Organization of Judicial Council

Effective operation by a judicial council presupposes effective organization. The ideal council should have at least one member who is by experience well qualified to know the difficulties currently experienced by the appellate court, another from the trial courts of record, another from the inferior courts, another from the quasi-judicial administrative boards, and another the general practitioner. A council composed entirely of appellate judges is doomed to failure. Appellate courts are, or think they must be, too busy for the entire membership to devote sufficient time to judicial council work or revising rules to work effectively. For part of the time, one member can be spared from any bench. At least three or four days a month should be set aside for the work.

Various "skills" are required and should be represented on the council. Well-qualified research talent is usually available from the law faculties. There should be an ambitious secretary with an eye to detail, a sense of news values, and with nerve enough to "jack up" a chief justice if he fails to deliver his assignments on time. The council should contain some members who have had recent experience as members of the legislature, and who are willing and able to devote such time as is necessary, preceding and during the legislative session, to the essential work of seeing to it that the recommended bills are enacted.

### Broad Program Needed

A judicial council should not engage in mere patchwork. It should work out a definite program of broad scope, which may include various fields. Sub-committees should be assigned to various portions of it to study and report with recommended drafts of proposed rules or statutes. These should be sent to each member before the meeting at which they are brought up for discussion, so that considered judgment can then be expressed. A council should never "go off half-cocked."

The most valuable research tool available to judicial councils is a three-year file of the Journals of the American Judicature Society, obtainable at slight cost. Each member should have one. In these well-indexed volumes will be found most scholarly and scientific studies, articles and reports upon all of the major current legal problems. The nation owes a great deal of gratitude to those who have made the Society both the leading legal research institution and the foremost factor in the development of the judicial council movement.

When the council has worked out some desired measure, it should draft every bill or proposed rule with such care that no amendments will be required. Legislative draftsmanship involves a peculiar type of skill, which must be developed or acquired.

Dean Clark once said: "Any program of reform of justice which does not face the likelihood of an indifferent if not hostile legislature, and the bar at least one-third inert and one-third openly antagonistic, is not based on the realities of past experience." This is true, but the difficulties can be overcome by a little salesmanship. The council has nothing it can "sell" until it can offer a plain remedy for a recognized need.

The council should have a prominent place in all bar association programs and in the columns of the bar journals, but don't expect too much of bar associations. Lawyers are trained to *dispute* and *disagree,* not to *cooperate.*

### Bar Approval—Not Endorsement

While a widespread understanding of the situation should be cultivated among the bar, it is a mistake to have a bar association endorse any measure. That usually arouses a suspicion that the lawyers have a selfish interest. Bills should be sponsored by the council. Endorsements by appellate and nisi prius judges will be most helpful, and their opposition is fatal, so they should be consulted and educated.

Carefully prepared statements should be issued through the press for general public information.

Once a session of the legislature has commenced, it is very difficult to secure enough of the time of any legislator to make a careful explanation of any important matter, and it is entirely unreasonable merely to give him an idea and ask him to draw a bill and nurse it. If legislative action is required, the proposals must be carefully explained to the lawyer members of the legislature before the session opens. Invite them to a council meeting and pay their expenses. The governor can frequently be induced to recommend in his message the enactment of any important and much needed legislation.

If properly presented, the judiciary committees will usually introduce the measures as committee bills. Such bills require no reference back to committee, and can be brought onto the floor for passage early in the session; with an assurance of proper endorsement and explanation, which is imperative. If voting is done by roll-call, pay particular attention to converting the first ten or fifteen names on the list, as that frequently starts a favorable voting landslide. Remember that to some extent, most bills must be lobbied through, regardless of their merit.

At the last session of the legislature in South Dakota we secured the passage of a bill authorizing a code revision, directing a complete shift of all statutory procedure into rules of court, recognizing the existence in the supreme court of constitutional, inherent and exclusive power to regulate all judicial procedure, including admissions and disbarments, and appropriating $50,000 for the editorial work incident to the revision. To carry the appropriation a two-third vote was required and secured.

### $50,000 for One Book!

Of course, you cannot always convert everyone. There was a Scotchman on our appropriation committee, who, after listening stonily to all of our arguments, came forth with this: "50,000 is a hell of a lot of money. And what do you want it for? For a book! Haven't you damned lawyers enough books already?" We gave him up for lost and went after others. Whenever a hostile or doubtful member was encountered, we telephoned to his personal lawyer and his circuit judge, explained the situation, and had them in turn telephone the member, recommending the bill. The expense was charged to the judicial council, which is financed by the State Bar. Through careful planning and attention to details, our judicial council and a mere handful of lawyers whom they enlisted, accomplished what was much needed and what was generally believed to be impossible.

An efficient judicial council is the best method yet devised to accomplish safe, sane and democratic reform and progress in the law, and to head off and defeat the ill-advised proposals which frequently spring up. The slogan of every council should be: "Justice must be administered surely, promptly, efficiently and with economy, both to taxpayers and to litigants."

If we lawyers do not propose and see to the enactment of the necessary remedies and improvements, attempts at such will be made by others less competent than we, and the result may not be to the public welfare or to our lik-

ing or advantage. The sooner justice is administered as it ought to be, the sooner will court-shy laymen return to us as clients.

What is far more important, the bar will again be rendering to the public that efficient and unselfiish service which only the bar can furnish. The recognition of such high ideals and the discharge of such important responsibilities is at once an opportunity, a duty and a privilege. Ours is the duty to keep burning brightly the lamp handed to us by the fathers. To do less would be unworthy of our high calling. I hope and pray that we of this generation will not be mere *custodians* of the law, like the servant who buried his talent, but will be sound *builders* like the faithful servant who used his talent to gain yet another, and thereby entered into the joy of his Lord.

# Review of Judicial Council Reports—Michigan*

The seventh annual report of the Michigan Judicial Council covers the year 1936 and is dated June, 1937. It devotes to its report to the governor and statistical tables 55 pages, and to a special study of the Administration of Family Law in Michigan, 132 pages. This study is consistent with the practice of including with each report a study of some important phase of law or its administration.

The report shows that in the past five years law cases have decreased and chancery suits increased, the total number of civil causes commenced being nearly the same. Taking the two dockets together there was a slight reduction in 1936, but in 26 circuits out of 40 there were more cases started than completed. Of criminal cases there were fewer than in any of the preceding four years, but there remained 179 more than were disposed of.

The more significant figures are on distribution of load in the circuits. The sixth report (for 1935) had shown a crying need for redistricting, but nothing was done about it. The present report shows a variation in cases per resident judge from 20 to 232 cases. There has been for a number of years special assignments so that the trial judges are kept fairly busy, but this resort is being pushed too hard, and redistricting is essential in order to balance the loads.

The supreme court work has materially increased. In 1936 there were 517 opinions written, 582 motions heard and 265 cases heard on oral argument. These figures all represent increases over the preceding year.

### Family Law Administration

The research study was financed by the William W. Cook Research Endowment, Law School, University of Michigan, and executed by Theodore E. Lapp, Frank E. Cooper and Prof. John P. Dawson. The authors describe the scope of their studies as an attempt "to describe the jurisdiction of the various courts in Michigan which deal with cases directly affecting the family; to ascertain how they function; to determine to what extent the objectives set up for the family court in other states have been achieved in Michigan; and finally to suggest ways and means of improvement." Since the problems are more acute in congested areas much attention has been centered on Wayne county (Detroit), with studies also of three more typical counties.

The following chapter titles will give an idea of the scope of the study:

1. Scope and purpose; 2. jurisdiction; 3. court organization, personnel and expense; 4. pretrial investigation; 5. detention pending trial; 6. the court hearing; 7. disposition of cases; 8. interrelations of the various courts; 9. recommendations. There are finally transcripts of proceedings in five cases.

All this jurisdiction is comparatively modern and has been growing by an evolution of experiment, experience and patchwork. It is doubtless unfortunate that the lack of court unification and rule-making powers has made evolution awkward. The courts generally appear to have done better in this than in some older fields, due probably to a sympathetic attitude and to the use of expert agents.

The principal recommendations are for an increase in the personnel of the administrative staffs, and that probationary officers and other administrative assistants be placed under civil service rules. Specific recommendations are made as to improvements in the juvenile and circuit courts and the Recorder's court (Detroit).

*Other judicial council reports were reviewed in the April and June numbers, 1937.

# Bar Vitally Concerned With State Government

## The Profession's Projects Call for Statesmanship—House of Delegates Plays Part — Its Constituent Bodies Have Great Role in Government by Law

The house of delegates of the American Bar Association affords a means for implementing the work of the Association to an extent not yet realized. The new organ must develop its powers through experimentation. But some fairly positive theories may be advanced.

To begin with, the actual carrying through of settled policies by the Association itself — the giving of concrete expression to its planning—is not likely ever to become at all general. In some instances, as when representatives of the Association have lobbied for bills in congress, or against them, there have been positive results. But for the greater part policies are to be executed in the state, often through an education of the public as well as the legal profession, and for this purpose the Association must serve mainly as a field for developing information and opinion, to be transmitted to the state and local associations.

The purpose of the house of delegates is to determine the right answers to all debatable problems in the legal realm, and especially those problems relating to the administration of justice. But when principles are settled by votes in the house, there remains the matter of stimulating action. This action, in most instances, will be by the *constituent bodies,* the state and local bars, or there will be no action.

The principles enunciated by the American Bar Association in more than fifty years have mainly stopped with enunciation. There are two reasons for this impasse: only a few members have participated in the deliberations and voting, and the state and local associations, even if informed, have had no reason for accepting the counsel of the national body.

### House of Delegates' Place Defined

The house of delegates remedies both defects. Because it is composed of representatives of lawyer organizations in all the states its discussions will insure a breadth of experience; for the same reason its declarations of policy will exert a considerable influence on the participating organizations.

A first instance of this was observed in the meeting of the house in January when principles of judicial selection were approved. The subject has been so far ahead of most lawyer's planning, and so certain to provoke controversy, that the American Bar Association had not made a formal declaration, though it had devoted considerable money to encouraging study and providing material. Meanwhile progressives in a number of states had carried plans to the legislative stage, and in California a large share of the reform had been accomplished. From this time it will be easier to convert doubters in state bars. Eventually, we may hope, marked success in one or more states will further encourage adoption of a better mode of selecting judges, and better tenure.

There can be no coercion under any form of organization. It could be said that bar efforts are mainly directed to the *education* of the *individual* lawyer. The lack of proper means has largely thwarted these efforts. From this time they should be advanced by the implements afforded.

### Prosecutor's Office a Typical Problem

This general comment has been suggested by a report to the criminal law section by its committee on improvement in personnel in criminal law enforcement. The mere creation of the committee marks a long step forward after years of struggling with procedural problems. Something must be done about personnel.

Parenthetically, it would be interesting to discover how many other lines of effort should look to the house of delegates for implementation. Certainly court organization, if it ever gets the support by leaders which it has craved for more than twenty-five years. And particularly the matter of providing proper tribunals in place of the shabby local courts, usually depending upon fees for existence. These things will be large issues when lawyers are more disposed to back planning which is of value only to the public. At this time declarations concerning the need for and the use of rule-making authority are in order. For this and other projects the committees and sections of the Bar Association will exist as incubators.

It is a difficult matter to summarize the report on personnel. Comment on an earlier report of the committee was published in this JOURNAL (June, 1935). The importance to criminal justice of court organization, prosecutors, police and probation and parole officers is now accepted. The current report seeks to suggest means for

getting results. As to the office of prosecutor, which is the subject nearest to professional interest, the report frankly admits that the mode of selection, the tenure of office and the organization of the state's prosecutors is a problem of government, and not in control of the legal profession.[1] But so are all problems affecting the law and its administration in which legislation or constitutional amendment is required. This is no more a hopeless problem than judicial selection. Both involve constitutional amendment.

### What Local Bars Can Do

The committee, whose chairman is Professor Newman Baker, of Northwestern University Law School, has performed a needed work in analysis. It has gone farther by showing that reform depends upon an education of the public, which must be done by local associations. Nearly all lawyers are properly interested in law enforcement and nearly all have influence in shaping public opinion. In recent years there has been groping for topics of study to invigorate local associations. There are plenty of topics and the procedure of developing remedies through committees and sections and of gaining approval by the house of delegates is perfectly adapted to meet the needs of local associations.

The committee is skeptical as to the readiness of any considerable number of lawyers to interest themselves in state and local government in a nonpartisan way. There is reason for this doubt. Lawyers assume knowledge of government because they know how existing government is put together and operated. And where there is opportunity for them to learn of newer forms, such as commission-manager city charters, there are always lawyers, as individuals, prominent in a campaign for reform. Those active in this field must have learned of the planning for reform of county government. This has been under way for fifteen years or more. The slight progress made suggests very strongly that time is being wasted by direct assaults on local political prerogatives. To create one properly organized county requires at least legislative approval, and the office holders of fifty or a hundred counties are readily massed in opposition.

### State Legislatures of Supreme Importance

In our system the state is the significant unit in government. There have been fair results in improving state government (mostly by small accretions) but much more improvement is needed. Interest in the unicameral legislature is the most encouraging feature to those who look upon the improvement of state government as the greatest insurance of the integrity of our entire American system. The legislature, in any scheme of popular government, is the very heart of the system. It does the thinking and controls most of the doing. Given efficient state legislatures and we would look to the future with more confidence. Great Britain, our earlier example, is now governed virtually by a single chamber of parliament. The unicameral legislature has thrived in some of the dominions, and notably in three Canadian provinces.

For the accomplishment of a number of its larger objectives the bar of the country is dependent upon improvement in governmental organization. We should expect that before long other committees of the American Bar Association will appreciate the need for lawyer interest in the improvement of state and local government. Here is something that even the smallest local bars can work on productively. A year ago President Ransom called the attention of the profession to the need for bar statesmanship in respect to local government. What could be more appropriate than local bar leadership in this field? It is not intended, however, to suggest that the lawyers take the brunt of circulating petitions, or moving the legislature, on behalf of constitutional amendments. For that they should ally themselves with other civic bodies. Their part would be largely that of education. And what could do more to impress the public mind with the worth of the profession, and the justification of its prerogatives?

To get back to the committee report; the criminal law section is urged to adopt the following resolutions:

### Committee's Formal Expression

(1) That it is the opinion of this Association that there should be a reduction in the case-loads of probation, parole, and crime prevention agents and that such workers should be selected through competitive examinations and should be given permanence of tenure.

(2) That the police forces should be organized to provide for permanence in tenure, but rigid civil service requirements should not be allowed to prevent promotions based upon merit, necessary in all career services.

(3) That the local bar associations and lawyers generally should stimulate the organization of "in-service" training schools for local police forces.

(4) That local bar associations be requested to appoint committees to survey local government agencies for the purpose of ascertaining administrative and personnel weaknesses therein so far as they affect criminal justice.

---

[1]For a comprehensive study of the office of prosecutor see article in Jour. Am. Jud. Soc., 20-196, and references.

# Random Thoughts on the Office of Prosecutor

**The best surety of adequate enforcement of the criminal law is an honestly zealous prosecutor.**—*Martin W. Littleton.*

"In the large majority of our states, unrelated police, investigating, prosecuting and prison agencies attempt to carry on a war against the criminal wholly without relation to one another and always without responsibility to a single coordinating head. The comparative success of the federal government in combating the crime wave clearly indicates that we must initiate in our states an intelligent, crystallized and well defined program of crime reduction through the means of some responsible unifying force in our state governments."

While the matter of interstate compacts appears to be to the front at this time, the need for intrastate organization will not diminish. Its dominant quality insures this. If it is not now made a chief object it is because it is politically difficult. And because it is difficult there will be a strong tendency to accomplish coordination by statute law rather than by constitutional amendment. The statutes will provide for some sort of supervision of prosecutors' work by the attorney general.

As set forth in an article on this subject in the Journal for Feb. 1937, p. 196, there is nothing new in the idea. Quoting from an article by Professor Earl H. DeLong we showed that in a number of states the attorney general has the power and duty to supervise local prosecutions and to require reports from prosecutors. But the duty is largely ignored and the powers unused.

And so the quotation appearing above makes a convenient approach to this subject. It is taken from a very informative article concerning the federal department of justice, written by Mr. W. Earl Smith, who has served as assistant to the attorney general. (Bulletin, New York State Bar Assoc., Dec., 1936.) It is notable that activity of various sorts by the department of justice has been eminently successful. From the first detective work all the way through to parole the work of numerous officials have been coordinated.

This article, and all similar ones, are sure to whet interest in developing the powers of attorney generals in the states. But this article does not prove that a state department of justice can get the results rightly attributed to the federal department. There is little reason for supposing, when one considers the difference between federal and state prosecutors, that the work of prosecuting throughout a state can be much improved by coordination under a state head or department, whether based upon statute or constitutional law. And yet we can imagine that the police and prison work can be much unified and improved. Why this difference?

### Get the Prosecutor Out of Politics

The answer is simple: prosecutors in the states are elected officials. As such they are politicians. Even if the coordinating state office were made non-political, it could not seriously affect the intimate official work of political prosecutors. It could not, for instance, insure the choice of competent prosecutors. We do not mean competent lawyers, although in many places it is hardly possible to lure them into the prosecutor's office. We mean lawyers who are competent and who also have the training and the disposition to devote themselves wholly to the "war on crime." There would be some such, naturally, but the system could not insure them against political hazards.

Under the elective system we make the office preeminently political. The result is what our long experience should teach us to expect. As has been often said, the only factor that has permited us to cling to this outworn policy is the requirement that prosecutors be chosen from the ranks of lawyers. But the same requirement exists, at least as a practical matter, in the judicial field. There may be some reason why all the arguments against politically chosen judges do not equally apply to the office of prosecutor, but the two officers are in many respects identical.

In neither the case of the judge nor of the prosecutor is there any impropriety in discussing the defects of political selection and tenure. Such discussion, and criticism, is directed solely to the office, and not to the incumbent. The demand for a better way of selecting judges is best founded on the need for treating them fairly, of relieving them of political fear and worry.

Perhaps the kindlier way of discussing the office of prosecutor would be to first postulate an ideal. One then begins with the need for an expert and responsible form of appointment, and a means for protecting the office, when necessary, by expulsion founded on a judicial investigation. Otherwise there should be permanency of tenure, and the office should be accepted with the expectation that the incumbent intends to take his official duties seriously, to devote a considerable number of years to the public service, and to serve none other. Well, that seems to be about all there is to it, unless we add a sufficient stipend

to insure a wide choice for appointment and a desire for long service and no other income.

We have learned through crime surveys, though it was never a secret, that prosecutors perform a considerable share of their important duties outside of the courtroom and subject usually to no accounting. We should understand also that the decisions so privately made call for mature and experienced judgment, something quite different from the dramatics of the forum. We should expect the prosecutors so selected and protected as to tenure to constitute a body of state officials having all together a heavy responsibility to the state and to society. We should expect them to meet and discuss and share experiences. And we should expect them to desire supervision, so that their responsibility may be shared with a higher officer or board.

### Our System Should Be Blamed

It has assuredly done no harm to study this office, even though there be reflections unfavorable to some incumbents. But the course of political reform too long has been that of picking out a scapegoat. We have too long looked upon our system as inevitable, if not divinely perfect. We should now learn to place the blame for inefficient performance where it rightly belongs, on a *system* which was too easily acquired and has too long escaped scrutiny.

As for the state head of the system we are just entering upon studies which present difficulties. We are warned, as in the articles written by Professors Baker and DeLong, and quoted from in this number, that we cannot assume that an attorney general is sure to cure all the weaknesses of the prosecutor's office. And it looks pretty hard to make the office of attorney general appointive; and that might not be enough. As in the case of judges, who wants to have governors appoint attorneys general? The proposal is too simple. This suggestion is hazarded, that there might be a state board which would employ as superintendent a prosecutor of long experience. That board might also supervise paroles and advise as to pardons. This might be accomplished without amending a constitution.

As we grow in knowledge of the things needed in the field of judicial administration there gradually develops understanding that state-wide functions must be directed by state officials. We can learn much from the use of unsalaried state boards. The best way to select prosecutors may be found to be less difficult, on the whole, than the best way to select judges. In this latter field we find no part of the present structure of state government, as it is, which can be relied upon. But in every state there are a hundred times more citizens, informed and willing, than are needed, if only the system makes a place for them.

The legal profession cannot leave these problems to so-called political scientists, for they have their hands too full as it is, and have little power to effectuate their plans. They, in fact, have for long virtually ignored problems within the orbit of the legal profession. There is room for cooperation, but the bar should recognize the duties in its field and be jealous to serve and take the credit for statesmanship.

---

### Judge Loves Juror

The following ample eulogium of the office of juror is reproduced from a card which, at the top, carries the name of a judge of a city court. Each juror, it may be presumed, receives such a card which he may carry home as evidence of his "aristocracy of service."

The American Peerage

Gentlemen of the Jury, by being selected for jury service you have been elevated to the peerage of democracy. As such you have a noble opportunity for service, obligated by patriotic duty to God and Country. This duty is deserving of the consecrated dedication of a conscientious concentration of your abilities and the just impulses of your honor.

You are a shield of protection against false accusers, transitory passions and prejudice.

You are determiners of truth revealing the character of our country as a land of the free and home of the brave.

You are the preservers of liberty that walks with progress and restrains only libertine license to insure its own freedom.

You are protectors of all legal rights of society, citizenship and the state.

You are guarantors of justice, constitutional and statutory, exactly, evenly and universally applied.

You are the custodians of American civilization, for without law there can be no civilization, without courts there can be no law and without truth and independence there can be no courts.

The only title of nobility recognized by America's loyal house is in the peerage of the jury box where trial by peers determines the truth of issues between the state and its citizens.

This title carries no feudal privilege or materialistic value, however, it merits the accolade of achievement—the accomplishment of the aristocracy of service.

This high honor carries only the title as a word of address or as an adjective of description, "Gentlemen of the Jury."

# Pretrial Procedure—France and Germany

## Disposition to Get Rid of Non-Controverted Matters Supplemented by Recent Changes in Codes—Conciliation Favored

Publication in the last preceding number of this Journal of information concerning pretrial hearings in Boston and Los Angeles induced President Newton D. Baker to suggest that present efforts to prepare cases for trial with a minimum of controversial points deserved comparison with similar procedure in the courts of France. The Editor applied to a leading authority on continental procedure, Prof. Robert Wyness Millar, of Northwestern University, who kindly cited references in his translation of A History of Continental Civil Procedure.[1]

It appears that since 1790 an effort to conciliate legal controversies has been required in France, the proceeding being before a justice of the peace. It was found that such a hearing was not suited to a number of types of controversy, and they were, after experiment, omitted.[2]

The present situation is best told by quoting from Professor Millar's letter:

"What Mr. Baker has in mind is apparently the decree of 30 October, 1935 (Bulletin legislatif Dalloz, 1935, p. 881), by which certain procedural changes were effected, in relation, among other things to the preliminary stages of the cause. The decree in question provides for registration of the cause, after service of the summons, and for a separate *dossier* for each case *inscrite au role,* that is, set down for hearing in chief before the full collegial court. It provides that the president of the court or the particular chamber shall indicate on the margin of the register "the name of the judge who will be charged with following the procedure and the day on which the cause will be called." As to the duty of this judge, it is declared that "in every case and at any stage of the cause, the *avocats* of the parties having been heard or called, the judge charged with following the procedure, may, upon motion of one of the parties, and without prejudice to the principal question, order all measures of information, without prejudice to those to which the tribunal may ultimately resort." He may also deal with certain exceptions relating to the interchange of documents and with demand for relief pending the suit. Provision is also made enabling the president or the judge in question to advance the hearing before the full court of causes of an urgent nature, or requiring but brief debate, or those which by law are to be heard summarily. The judge charged with the procedure, is, at the opening of the general hearing and before argument to make to the court a summary report (without disclosing his opinion) as to the object of the suit, the state of the procedure, and the respective allegations and prayers of the parties.

"In the ministerial report explaining the reasons for the decree, it is said, concerning the judge thus charged: 'Without in anywise directing the progression of the cause, it will be possible for this magistrate to control its development; he will be able to order measures of instruction and to decide certain exceptions raised by the parties, and at the opening of the hearing in chief he will present a summary report as to the pretensions and grounds of the parties. These measures will permit useless complications to be avoided and assure the dispatch of causes more rapidly and at less expense.' "

Continuing, Professor Millar says that " 'the measures of information' referred to above, include nothing new—nothing, in other words, but what the party might previously have obtained from the full court. The principal thing accomplished, it would appear, has been to vest the single judge with power to do what previously would have necessitated application to the court itself. This is assuredly a simplification of moment, and the fact that a given judge is assigned a given cause for this purpose naturally will lead him to take a proprietary interest in its effective preparation. . . As a matter of pretrial procedure it is of course decidedly different from anything we know by that name. . . The German system, amended in 1924, furnishes an example much closer to our idea."

### Pretrial Under German Code

Turning to Engelmann (p. 618), we find that the German code of 1877 required preliminary discussions to a limited number of actions, and now this procedure is extended to every case "unless the circumstances are such as to render it unnecessary." The judge first tries to conciliate the parties; he renders judgment in case

[1]Vol. VII, Cont. Legal History Series, 1927; by Arthur Engelmann (and others).

[2]Conciliation for more than a century has been an important feature in Denmark and Norway. Bul. XV, Am. Jud. Soc., gives much information concerning conciliation in Norway and in certain municipal courts in this country.

of confession or default; "he decides the issue of law or fact upon most kinds of dilatory exceptions where these are not reserved for determination with the merits. . . He is explicitly charged with the duty of bringing about a discussion of the cause in all its aspects and of seeing that it is so forwarded as to admit of disposition, where feasible, at a single hearing before the collegial court." He may even take the proof himself, or else reserve the matter for the full bench. Other provisions look to a thorough sifting of cases before trial.

Under the present rule the judge is required to insure sufficiency in the allegations and prayers and to discuss with the parties both the law and the facts. He may require the parties to declare themselves on specific points in order to narrow the issue. He may, on his own motion, reject allegations or proof, calculated to delay the cause, which have been withheld purposely or by gross negligence. "A second important aspect of the increased directive power relates to control over the progress of the cause. This, almost entirely, has been taken out of the hands of the *parties* and vested in the *court:* in other words, the principle of party-prosecution no longer retains its former ascendancy."

All of which suggests that self-respecting courts will not permit parties to play a game which interferes with the court's essential function and tends to bring it into disrepute. Our adoption of pre-trial hearings illustrates the opportunity of our courts to regulate proceedings before and on trial without statutory power or admonition, but only on the court's duty to protect itself and its public duty. Unfortunately this attitude has been taken only after legislative inroads upon judicial freedom which have been accepted so long as to appear to entitle them to authority which they never possessed.

Readers not familiar with the history of pre-trial hearings in this country and England will be interested to read the first articles on the subject. Apparently the adoption of this practice originated both in Detroit and in England independently, as the result of studies looking toward efficient procedure. The Detroit experience was reported in this Journal for February, 1933, together with an abbreviated account of the "new procedure" in England, derived from the longer article in Ill. Law Review of December, 1932, by Professor Millar, who had the good fortune to be in London and observe workings of the new rule in its earliest use.

# Profession Dedicated to "Herculean Task"

## In Inaugural Address President Arthur T. Vanderbilt Points to Numerous Problems in Solution of Which the Bar Alone Can Guide Nation

Like the Boston meeting of last year, the 1937 convention of the American Bar Association will be remembered by all of more than 4,000 lawyers who attended, for its unprecedented and unanticipated devotion to the public services which depend upon bar planning and action. It would really be impossible to convey to those not in attendance the extraordinary interest evinced in all of scores of sessions provided for the assembly, the house of delegates, the sections and committees, standing and special, the section committees and round table discussions and the meetings of numerous allied bodies.

At the last session of the assembly activities approached an end; the house of delegates had elected Arthur T. Vanderbilt president, there being no competing candidacy; and the new president was introduced to the audience and delivered a brief and very earnest address.

In his first paragraph the President said that "our thoughts should be focused not merely on those who attend our annual meetings but also on those members who cannot attend, yes, on those lawyers who are not yet members of the Association, and beyond them, on the public at large.

"I emphasize the public at large, for I take it that the fundamental proposition underlying all our activities and on which all bar association work is premised, is that any measure which is not for the best interests of the public is not for the best interests of the bar; or to state the proposition affirmatively, those interests which are for the best interests of the public are for the best interests of the bar. This fundamental proposition, I submit, is not debatable in any bar association. To question it, to seek to put the interest of the bar above the interest of the public, is to reduce ourselves from the high level of a profession, a public calling, to the grade of a trade or occupation. More than that, it would be to sell our birthright for less than a mess of pottage. It would mean self-destruction. Just as the standing of the individual lawyer is dependent on his good reputation, so is the standing of the bar dependent on its good repu-

tation with the public. And how shall the bar maintain its good reputation with the public save by putting the public interest foremost?"

It is needless to say to lawyers that President Vanderbilt spoke from no weak convictions. His devotion to the best traditions of the profession in numerous ways—as founder and chairman of the New Jersey judicial council, as chairman of the National Conference of Judicial Councils, as an active agent in the emergence of the junior bar movement, and in numerous other activities as practitioner, teacher of law students, and bar association officer—his record is conspicuous and convincing, and made him the logical choice for bar leadership at a critical period in the profession's history.

Under various headings the address, which will be available in full text to all members of the national association, dealt swiftly with the major interests of this time—the place occupied by the new house of delegates, policing the profession, improving the administration of justice, the administration of penal laws, cooperation with the Judicature Society, the administrative tribunals ("our paramount problem"), and finally an answer to the question, "Can the bar solve these problems?" Here it is necessary to quote:

### Can and Will the Bar Act?

"The only answer I can make is that in the past it has risen to every responsibility it assumed in the public interest. To my mind there are many vital substantive issues on which the bar should be taking its stand, because of our peculiar knowledge and experience, but as to which we are virtually precluded by the consciousness that the public will say that we have no right to speak until we master the judicial and administrative processes, until we have put our own house in order.

"Will the bar meet these pressing problems? If its recent resounding proclamation of allegiance to the principles of the independence of the judiciary was anything more than an emotional reaction to a crisis, if it meant that we really believe in the independence of the judiciary, it will. From the lowest court in the land to the highest, from the most obscure administrative tribunal to the most exalted, we must see to it that the judges in the judicial department and in the coordinate administrative branch are so situated that they may work *independently* and *effectively*. Then and then only can we reasonably hold them personally responsible. In many states this will mean taking off the trial judge the fetters which have reduced him to the ignominious role of umpire. In every state and in the federal government, it will mean the overhauling and *reorganization* of the *administrative process* of adjudication.

"Will the bar tackle this herculean task? It will, if it can be induced to turn away from the swarm of petty problems we are attempting to meet, and to look at black shadows resting over many countries in four other continents—countries in which law has been replaced by despotism, where liberty, without which the spirit of man cannot survive, has perforce been banished, where courts, so-called, are in bondage, where law is one man's or one clique's whim, and where the bar is debased or exiled. That shadow can never grow here. The spirit which answered the tyranny of colonial governors, which wrote the Declaration of Independence, that cautiously framed the Articles of Confederation, that in due time forged the structure of the Constitution, and that, as our frontier moved west, decade after decade, carried with it the doctrine of liberty under law can and will in these times when we no longer have a frontier, solve these paramount problems of judicial and administrative justice in a commercial and industrial era. We will solve them because our duty to our profession and public opinion alike demands that we start to solve them and to solve them now.

---

### Science in Pursuit of the Criminal

A real success has been scored by the Scientific Crime Detection Laboratory of Northwestern Law School in its annual short course for prosecutors. The second seminar was held in August and was attended by eighty-two prosecutors from thirty states. While studies were had in the special function of the prosecutor the course appears to have been mainly devoted to the application of scientific methods to crime detection. This should mean a spread of knowledge from prosecutors to local police. The titles of illustrated lectures which were given show the range of study and its interesting nature: firearms identification; comparative micrography; photography; wire-tapping and dictaphone equipment; microanalysis; personal identification; forensic chemistry; medico-legal problems; tests for intoxication; document examination; detection of deception. Students were taught the use of apparatus.

Such a laboratory shows how backward our typical police methods have been. Were it not for the interest of a few experts in these various fields and facilitation of their work and instruction, we would be leaving scientific methods largely to certain of the smarter criminals, who are not slow to seize any advantage. The interest shown by these eighty-two prosecutors in crime detection will yield results, and meanwhile is a great encouragement to their instructors.

# Forced Retirement of Federal Trial Judges

## Sumner Bill Criticised—Superintendence of Bench and Judicial Self-Government Proved by Experience.

When the Judicature Society was organized there was an assumption that its interests and work would lie wholly within the field of state judicature. The federal system was looked upon as so nearly sufficient as to deserve no attention. The index to twenty volumes of this JOURNAL, now under preparation, contains references to only thirty articles on the federal courts and procedure, out of a total number of references exceeding 1500.[1]

The changes effected in twenty years bring the federal system under scrutiny. The system itself has acquired unexpected bulk and will continue to grow. We can still consider it in many respects less subject to criticism than the systems in many states. It is obliged to operate, however, throughout a continental area and with judges who are human. There is opportunity for improvement. The principles of judicial organization are no more abstruse than the principles of commercial and industrial organization. The supreme ideal is responsible management. In the judicial field controls are as necessary as in any other field, but they extend only to administration, leaving every judge independent in the exercise of his essential function.

It is concerning administration of the federal court system that we are now interested. The approach is an awkward one, since it bases, to this time, almost entirely on the problem of involuntary retirement.

* * *

A fascinating constitutional problem is posed by the Sumner bill (H. R. 2271), the text of which, after house passage, was published in the August number of this JOURNAL (p. 59). The bill provides a mode of retiring district judges for cause, after trial by three circuit court judges selected by the chief justice, as an alternative to impeachment. The proposal has been held both constitutional and unconstitutional by eminent lawyers. In the absence, then, of resort to supreme court advisory opinions, the congress must pursue the established mode of trial and error, if the question is ever to be determined.

In publishing the bill the intention was to facilitate knowledge of its contents, and not to give it unqualified approval. It is interesting to note, in the report of the American Bar Association committee on jurisprudence, a resolution approving the bill except as to the forum of trial, and with an assumption as to its constitutionality. The committee would have a district judge tried by a "court of seven circuit judges and to allow an appeal in all cases on questions of law, and on questions of fact where two judges dissent as to material and controlling facts."

* * *

The committee deals also with the senate bill, which assigns such proceedings to a bench comprising all the senior circuit judges, and makes the point that such a tribunal is unnecessarily large.

It is unfortunate that the considerations in senate and house, and by the committee on jurisprudence, all stem from dissatisfaction with impeachment and are concerned only with "capital punishment" for serious offenses.

The right philosophy is to derive plans from an understanding of the entire matter of judicial organization and self-government. As to this we have abundant experience in some of our well-organized municipal courts. The first object, naturally, is to create an *environment* which strongly tends to prevent judicial practices and conduct which are subject to criticism. This is done by providing that the bench as a whole (or by committee) receive and consider all complaints against judges. Experience shows that such provisions have the needed prophylactic effect. It is true that there will be complaints having no sufficient justification, but freedom of complaint about judges is just as important as freedom of complaint against practitioners. All grievance committee work proves the value of

[1] Any reader interested in the subject dealt with will want to see also the most expert and informative article entitled: Federal Judges—Appointment, Supervision and Removal—Some Possibilities Under the Constitution, by Burke Shartel. Mich. L. R. Vol. 28, Nos. 5-6-7 (1930); Jour. Amer. Jud. Soc. (abridged) Vol. 15—Pp. 21-46-79 (1931).

complaints and investigations, though very few result in charges. Between idle complaints and formal accusations there is a broad ground for the disposal of unfair complaints and for the adjustment of certain valid complaints by consultation with the lawyer or judge complained of, accompanied often with sound advice and warning.

Lest the reader think that this system of self-government burdens the bench it should be said that virtually all complaints against judges are adjusted through the office of the chief justice, and nobody ever hears of them except the lawyer or litigant who complains, and the judge who is accused of fault. There are, however, complaints not affecting any individual judge, but concerned with the court's other officers and the mode of administration. These are properly discussed at judges' meetings, and with advantage to the court in all respects. The clerks and process serves have it in their power to prejudice the court's administration and without an outlet for complaints there is little opportunity for checking on these officials. This principle must apply to all courts as well as all business organizations.

* * *

There were really no current ideas concerning judicial organization anywhere in this country when the Chicago municipal court act, full panoplied, came into existence. At just about the same time Pound's address on causes for dissatisfaction pointed to the need for unified court organization, but with reference to waste and delays, rather than judicial morale. Before any general adherence was won for the principles set forth by Pound the Chicago experiment had proved entirely successful. This court's rule-making and organization derived in part from the English judicature acts. Its provision for self-government derived from plain common sense and a universal practice in the field of business organization.

For over a century there had been no right conception, though the shortcomings of impeachment were occasionally forced on attention. Since impeachment is so much a political method, and for other obvious reasons, it never could accomplish the central object of building up in a court an esprit de corps. It could be only a last resort, and far from being ideal as such.

* * *

The simple, sensible, and well proved method of maintaining judicial standards and building public confidence in individual judges should be the starting point for consideration of machinery alternate to impeachment. That judges are human, as is so often asserted, is really a fortunate thing, for this means that they will react to safeguards created in their own defense, just as other people do. It is simply the matter of the "ounce of prevention" applied at the right time.

* * *

In application of this theory to the federal judiciary we find the need for only a slight change in administrative machinery to accomplish the main object, that of *preventing* minor judicial faults. Dr. Pound's classical proposals for conserving time, and litigating cases themselves, rather than the record, will be facilitated by the new procedural code. His proposals for administering the business side of administration calls only for a strengthening of the annual "conference of senior circuit judges," commonly referred to as a judicial council. Neither term is appropriate. The proposed standing committee on rules would be more like a judicial council. The present conference should look mainly to the expedition of the court's business, and should have complete statistical information as a basis for that function.

This could easily be supplied by providing for the selection by the chief justice of a competent business manager, under whatever title, except that of proctor, which implies responsibility for judicial conduct. This slight addition, with resulting facts concerning administration in all districts, is obviously needed, though it has little bearing on the matter of judges' conduct.

Coming then to the pending bills it may be said that complaints concerning the conduct of district judges should be dealt with by the circuit judges. Those requiring trials—and they would be exceedingly rare—should be initiated by resolution of the circuit judges for their circuits. Trials could be by a court of three or five circuit judges, all selected by the chief justice from other circuits.

* * *

On this principle of judicial self-government the Sumner bill, making the house of representatives a grand jury, is wholly wrong. The house would be an alien and entirely unsuitable body for preferring charges. Even with the machinery for remedying small faults above proposed, the house would be unsuitable. The reason is that publicity involved in discussing a judge's alleged fault on the floor of the house, or in committee, would ruin the judge even though he should later secure an acquittal in the tribunal set up for trials.

Our federal judiciary, as Pound reported in 1906, is more unified than that of most of the states. It is suggested that the chief justice might have one assistant to the supreme court clerk, specially chosen, who would acquire, as a

continuing function, all information concerning the administration of the various courts. This would enable the conference of senior circuit judges to make and change programs for administration. The demands for transfer of judges under the recent act of congress (sec. 4) would go first to this special statistical clerk, as we might call him, and in him the chief justice would have a responsible agent to rely upon in ordering transfer of judges to other circuits. Doubtless this arrangement will be made, but the special clerk should be authorized and required to accumulate all statistical data.

* * *

The system of clearing complaints concerning trial judges could probably be engrafted without legislation. Nearly all of the work can be done in part time by one dependable clerk in each circuit. Only when judges made an issue concerning a complaint that appeared to be justified, would it be necessary for the circuit judges to consider the matter. Their *reasoned opinions* could be depended upon to adjust these exceptional complaints.

For the final and drastic instance calling for forced retirement legislation will be needed.

* * *

Readers patient enough to reach this paragraph are doubtless disposed to think that a system of judicial self-discipline useful in a large city court which exposes its judges to political and other hazards is not at all needed in the federal system. There has been very generally a disposition to look upon United States district court judges as superior in all respects to the trial judges in the states. There has been some warrant for the confidence and respect paid to the federal judges. To assume however, that they should be above supervision is not warranted. This assumption has been highly detrimental to the judges themselves.

In some respects the district judges are more exposed to administrative error and to temptation that members of a large city bench. Their work is performed in isolated courts and the only check on it, unless by the department of justice (a political agency) lies in appeals.

The impression has been general that presidents are able and anxious to select exceptionally able lawyers for the district court. This is less true than it was before the World War, when salaries were considerably nearer to needs than since that time. Judge Landis once interrupted a trial to tell this writer how he had been obliged to lower his standard of living on a salary of $6,000. For several years he was restive before he resigned and took a position which paid him vastly more.

But the salary is the lesser of two serious impediments to free appointment. We know, since President Hoover's revolt against political dictation in the case of Florida and Minnesota appointments, how a president's hands are tied by politics. As has been explained by Dean Wigmore, the president is obliged to avoid conflicts with senators because treaties require a two-thirds affirmative vote, and many of these treaties are submitted and voted upon and not reported by the press because they deal only with details. They may be very important to the state department and to commercial interests and yet not rate as important news. A president in frequent conflict with the political interests of senators would find his proper powers imperilled.

We have learned more recently of the political maneuvering and trading involved in judicial appointments because of the publicity given to the matter by the party not in power. The profession is learning things of high significance. Again there is need for an unbiased survey. But with no more than the occasional outcroppings of information we should realize that the minor federal judicial appointments are subject to influences which are hostile to the service.

The traditional view that federal judges, because of secure tenure, are beyond temptation, might just as well be abandoned. The more nearly absolute the security, the more is it an actual danger. These judges are being selected more or less on a basis of political support and they enter upon their duties with obligations to various local politicians. It is not necessary to muster instances of improper conduct in order to reveal the weakness of the system.

* * *

The strain comes in the federal courts, just as in state courts, in the choice of receivers. In a very few districts we have heard of judges incurring political enmity by refusing to appoint friends to lucrative jobs. On the other hand, for many years there has been prejudicial gossip in respect to receivers in bankruptcy cases.

The ideal is that every judge should be free from debts of gratitude for his elevation, that he should have but one allegiance. This is not possible in a system of appointment by one official and confirmation by other officials. But it is readily possible, by rules and responsible superintendence, to make receivership appointments impersonal. This should be done, not only for the protection of creditor interests, but for the protection of individual judges and the judicial system itself.

Judges verily are human, and for their own good they need to be so treated. For their own

good they need supervision, be they city magistrates or federal trial judges, and supervision must be by the judges' own department.

* * *

The argument then is to substitute for prejudicial gossip concerning judges, which can harm but never cure, a continuing power of supervision. For the federal district judges the nearest and most convenient agent for supervision is the bench of their circuits.

There is current complaint as to the political and administrative authority exercised in the federal system by the department of justice. It is strange that this has not been publicized by discussions in the conference of circuit judges as reported each year. It is unfortunate that there has been no intimate study of the matter by friends of the court. We do not know how far this influence extends. Probably the department of justice agents took over certain functions because the judges were not so organized as to administer, and not so integrated as to interfere. It is submitted that any influence over judicial administration by the department for prosecution is an odious usurpation. At this time, when the preservation of judicial independence is uppermost in lawyers' minds, it is a pity that we have no complete survey of existing relations between the judiciary and the department of justice. Both the existence of usurpation and our ignorance of its extent illustrate the need for development of judicial self-government — for judicial integration.

* * *

It was Chief Justice Taft alone who conceived and brought about the creation of the conference of senior circuit judges. Its euphemistic title suggests the innate (but not incurable) resistance of judges to teamwork. Chief Justice Taft believed in making a start and trusting evolution. The time is at hand for evolving something more substantial. For years before the conference was created, and after that event, he never lost an opportunity to uphold the principles inherent in a properly organized judiciary, which he saw in action when he visited Chicago in 1910.

# Wisconsin Sets Example in Procedural Reform Method

In the last preceding number the Journal contained an article which harked back to proposals made in the meeting of the judicial section of the American Bar Association in 1934 in respect to exercise of the rule-making power. The specific proposal was that rules should be prescribed by the state judicial council, subject to approval by either the legislature or the supreme court. While that number was on the press the Editor received the August number of the Bulletin of the Wisconsin State Bar Association, wherein proposed rules and amendments of rules, drafted by the supreme court advisory committee (which rates as a judicial council) were published (p. 158).

The Wisconsin advisory committee on rules was intended to perform the same function as the rules committee in the supreme court of England, which is the classical instance, and it has so served. In the present instance nine items are submitted for supreme court approval, embracing amendments, a repeal, and a new section. Publication enables the bar of the state to know what is proposed. When the court has acted the changes in rules will appear in an early revision.

The proposal offered to the judicial section is seen to be no novelty. When a supreme court is possessed of rule-making authority it needs an advisory committee, and this should be a standing committee, one to function continuously more or less at its own volition, but subject also to practitioner suggestion. The court itself may offer suggestions. At any rate, the opportunity to propose improvements in practice and procedure is always present; expert consideration of all proposals is assured; and finally, after publication and opportunity for discussion, the matter rests with the supreme court.

In all states in which rule-making power is vested in the judiciary the same opportunity exists. Perhaps the chief limitation upon the usefulness of judicial councils is the lack of judicial rule-making power. In a number of states faithful work has been done by councils with no opportunity to make it register in fact except through bills in legislature. Such councils commonly do not consider lobbying appropriate. In some instances there is no established practice of bar support for such measures. The result has too often been a regrettable waste of effort.

A first thing then is to encourage bar association interest and participation; a larger need, and a present one, is to create opinion in favor of delegating rule-making power to the highest court. There is no reason, in view of several successful

efforts in recent years, to look upon this necessary step as one too difficult. This one link in the chain, supplied in a number of states, will put them on a par with Wisconsin, and insure steady and expert progress in improving procedure, a matter soon to be one of the profession's immediate interests, assuming the early adoption of the proposed federal court rules.

# Indiana Supreme Court Is Waiting for Cases

At its meeting in July the Indiana State Bar Association received from Chief Justice Michael L. Fansler a report showing that the supreme court had recessed June 24 for the reason that no cause was ready for hearing. Of the 32 cases on the docket not one was fully briefed and so ready for distribution. "So far as the condition of its docket is concerned there is no court in the United States that surpasses our own today." And probably there has been no such instance in fifty years in any appellate court.

Accompanying a statistical report which appears in the August number of the Indiana Law Journal, there is needed explanation of this situation, supplied by the Chief Justice. There has been, he said, a great deal of criticism of the court in the past decade, much of it voiced at bar meetings. "The general theme of all discourses on the subject was an expression of regret that the supreme court could not perform the duties and functions imposed upon it with sufficient promptness to avoid delays that too often proved costly to litigants and distressing to lawyers charged with the prosecution of appeals."

It happened that the number of new cases and petitions filed ten years before was precisely that of the past fiscal year—249. As recently as 1932 there were 316 cases and 59 petitions pending on completion of the year. The hang-over of 127 cases and 28 petitions at the beginning of the past year was cleared up before July 1. Credit for better briefing is given to pratitioners. An increase in the number of cases disposed of without formal opinions was also a factor in the situation. In the previous nine years the highest record of cases without opinions was 36, and in the last year the number rose to 63, which is 26 percent of the total number.

Referring to the condition of the docket four years before the latest the Chief Justice said:

"When any five-man court has 300 cases ready for decision pending before it, that court is between three and four years behind a reasonably clear docket. With a court, as with any other enterprise, the only way to achieve a satisfactory status is for the amount of work completed to bear some reasonably fair ratio to the amount of work submitted."

Indiana has also an intermediate appellate court with a heavier load than the highest court. On its behalf Chief Justice William H. Bridwell reported for the past fiscal year disposition of 284 cases, a net gain of 48, with 364 pending, of which 254 were fully briefed. There has been consideration of a proposal to merge the intermediate court with the supreme court, and to one who has no more information than is afforded by these reports it would seem to be the sensible thing to do. And since much of the work done by appellate courts may be appropriately assigned to three judges, a court of eight or more judges may well operate in sections, keep up with its work, and afford its judges needed time for study and recreation.

---

### Dictaphones for Judges

In English courts judges make a practice of jotting down the substance of all pertinent testimony. To what extent this is done in Canada the writer does not know, but the practice is followed by some judges in some cases. The advantages in here in keeping the judge's attention on the testimony as it is elicited; on having a compact record for reference before advising the jury, and a very convenient record when a motion for retrial is being argued. There may be disadvantage in slowing up the trial; but this is not necessarily a disadvantage. For instance, efforts of counsel to confuse witnesses by rapid fire questioning may be thwarted, and in English courts the questions are fewer and the replies much more full, in consequence of which the judge finds it easy to summarize the essential facts related.

The subject is suggested by a statement made by Lord Hewart C. J. to shorthand reporters that he hoped to see the practice abandoned because it wasted time and distracted the attention of the judge. If the learned Chief Justice should live to see judges gossiping with interlopers or reading newspapers, he would learn something about distraction.

But the alternative is not necessarily to aban-

don notes in England or to adopt them in our country. A better way in both countries would be for the judge to hold in one hand the receiving end of a dictaphone. He would then be as progressive, and sensible, as the up-to-date doctor who gets a full and permanent statement of a patient's symptoms on the first interview.

It should be said, probably, that the judge making a brief dictaphone record would speak so softly into the receiver that his voice would be inaudible to others and there would be no interruption of question and answer. Merely making the record would fix salient items of testimony in the judge's mind, his attention would be confined to his job, and records would not need to be consulted in many instances. They could be translated to typewriting very economically and an expert use of the system should relieve counsel or public of much expense for stenographers in cases not specially important.

There may be no resort to the dictaphone as an aid to judges, and the chance will be more remote if the court stenographers look upon the proposal with jealousy. But a few months ago the use of statistical machines in a court was all but unthinkable, and now they are used hourly, and with conspicuous success, in the circuit court of St. Louis County, Missouri.

## Why Not Grade Courts on Administrative Talent?

Readers of this Journal have shown more interest than was expected in two brief articles concerning the grading of supreme courts. The first was comment on Colonel John H. Wigmore's study of courts based upon their rulings on evidence (vol. 20, no. 1, p. 21). The second described tests applied by Prof. Rodney L. Mott wherein the decisions of the courts were assayed by teachers of law, by each other, and by the United States supreme court (vol. 20, no. 4, p. 158). The purpose of each of these extensive and technical studies was to afford means for rivalry among our numerous courts of (approximate) last resort.

After preparing the article in this number concerning the efficient work of the Ohio Supreme court it has occurred to the Editor that another promising mode of rating judicial group efficiency is possible. If statistical information were acquired over a reasonable period, perhaps five years, it should be possible to measure the significant factor of administration. There would be shown, presumably, either progress in reducing the time between the filing and the ultimate disposal of contested cases, or lack of progress. This might appear to be a crude test, but it would be only a beginning, because there could be also consideration of the development of improved administration of various sorts. It is suggested that the matter of oral argument would be important. The survey could determine the extent to which oral argument is utilized, the time devoted to it, and especially the propinquity of argument to consultation and to decision. The not unimportant factor of general participation in decisions ab initio by all members of the court could be noted.

Doubtless other factors in administration would be discovered before the work was started, and factors could be included at any stage of the survey.

It is admitted that promptness alone is a suspicious factor, but it is far from negligible. It is, after all, a sort of ultimate desideratum, if clients' interests are worth considering. And one way of balancing promptness would be to ascertain the fate of decisions subsequently subjected to review in the United States supreme court. It may be assumed that promptness or speed would be checked by comparison of the number of judges to the number of cases. Perhaps a court which does not allow its members sufficient time for recreation and cultural amenities should be deprived of some credit on this account. Work done under undue pressure should be under suspicion. Perhaps reversals upon reconsideration also should score as demerits.

If done for a five year period such a study should be carried along in successive years. It would always be at least one year behind the record, and perhaps two, in order to include cases appealed to the United States supreme court. It probably would not cover sufficient time to permit use of the factors employed by Professor Mott, whereby the cases cited with approval by other courts was an important feature.

There would have to be, as in all such surveys, the application of statistical principles so that an inferior factor would not receive undue weight.

Whether or not such a survey would stimulate rivalry for high rating among the courts, it could surely be counted upon to reveal a number of excellent means for improving administration, which would fully justify the effort.

# Bibliography—Articles on Judicial Selection

A bibliography of articles on judicial selection should be of material assistance to many lawyers. A committee of the Pennsylvania State Bar Association on this subject, headed by Mr. John G. Buchanan, reporting for this year's convention, included a select bibliography which was made up by the director of the national bar program, Mr. Will Shafroth, and it is here reproduced. In submitting the references Mr. Shafroth made a separate list of articles published in the Judicature Society Journal, headed by the statement that this Journal "has more material on the subject than any other source." It is convenient to retain this separation.

### Articles in Judicature Society Journal

Selection, tenure and retirement modes described, with various proposed methods — by James Parker Hall, (1919—16 pp.) 3-37.
Debate on popular election by Commonwealth Club of Calif., (1919—13 pp.) 3-75.
Analysis of defects in popular election and retirement—Kales' plan of appoint. by elected chief justice, (1920—13 pp.) 3-165.
Duty and responsibility of the bar, by Wm. D. Guthrie, (1921—5 pp.) 5-41.
Bar should nominate judges, by George B. Harris, (1924—5 pp.) 8-258.
Technique of judicial appoint., by Harold J. Laski, (1926—7 pp.) 10-39.
Cleveland Bar Assoc. plan for appoint. system, (1927—7 pp.) 10-177.
Methods of selecting and retiring judges, by Albert M. Kales, (1928—12 pp.) 11-133.
System set forth in Am. Jud. Soc. state-wide judicature act, (1928—11 pp.) 11-145.
Cleveland Bar Assoc. influence, by Walter T. Dunmore, (1929) 12-178.
Lawyers should select judges, proposed by Samuel T. Bush, (1930—2 pp.) 13-134.
Cleveland Bar Assoc. plan; limiting campaign spending, (1930—2 pp.) 14-9.
Selection by elected commission, by Charles E. Matson, (1930—2 pp.) 14-13.
Results in Los Angeles Bar Assoc. campaign, (1931—2 pp.) 14-148.
Results in Cleveland Bar Assoc. campaign, (1931—4 pp.) 14-150.
Bad selections in large cities; proposal by Harry A. Gordon for limitation to list of eligibles, (1931—4 pp.) 14-155.
Timid proposal offered for New York City, (1931—2 pp.) 14-190.
Various ways of selection; discussion at Am. Jud. Soc. meeting, (1931—6 pp.) 15-38, 76.
Various ways of selection; discussion at Am. Jud. Soc. meeting, (1932—4 pp.) 16-37.
N. Y. C. Bar Assoc. favors appoint. by governor —N. Y. City Club favors nominations by governor, (1932) 16-45.
Platonic mode of selection, (1932) 16-46.
Calif. State Bar opposed to elections, (1933) 16-150.
Plans proposed in Calif., Ida., Ohio, Okla., Utah, (1933) 16-184.
Calif. and Los Angeles plans, (1933) 17-8.
Cleveland Bar Assoc. approves appoint. system, (1933) 17-9.
Rufus Choate on judicial tenure; add. in const. convention, 1853, (1933—11 pp.) 17-10.
Mich. judges—half now appointed, (1933) 17-38.
Debate in Conference of Bar Assoc. Delegates, by Julius Henry Cohen, Paul Lamb, Joseph O'Connell, and E. Smythe Gambrell, (1933—6 pp.) 17-75.
Judges and politics in Los Angeles, (1933—2 pp.) 17-91.
Better ways of selecting judges, by E. Smythe Gambrell, (1933—4 pp.) 17-109.
No theoretical perfect way, (1934) 17-131.
Politics and jud. admin., by Stuart H. Perry, (1934—7 pp.) 17-133.
Mich. Bar Assoc.—recommended plan, (1934) 17-145.
Albert Kales on selection and tenure, (1934) 18-45.
Calif. plan submitted to voters, (1934) 18-88.
Calif. plan approved by voters, (1934) 18-102.
Kansas Bar Assoc. adopts plan, (1934) 18-103.
Wash. Bar Assoc. adopts plan, (1935) 18-141.
Calif. plan—effect of, (1935) 18-142.
Utah Bar Assoc. plan, (1935) 18-143.
Ohio Conference determines policies, (1935) 18-144.
Florida Bar Assoc. proposal, (1935—2 pp.) 18-146.
Wisconsin Bar Assoc. plan, (1935) 18-147.
Summary of plans in Calif., Fla., Ga., Ind., Kas., Mich., Ohio, Okla., S. D., Utah, Wash., Wis., (1935—4 pp.) 18-166.
Calif. campaign described, by John Perry Wood, (1935—3 pp.) 19-50.
Shall we appoint our judges, by Stuart H. Perry, (1935-7 pp.) 19-78.
Lawyers as choosers of judges, (1935) 19-116.
Chicago Bar Assoc. warns judges against politics, (1936) 20-20.
Charles T. McCormick's plan, (1936) 20-39.
Ohio Bar Assoc. strong for new system, (1936) 20-93.
Mich. Bar's plan, (1936) 20-93.
Retirement and removal of judges, by Prof. Burke Shartel, (1936—20 pp.) 20-133.
Calif. selection plan not perfect, (1937—2 pp.) 20-174.
House of Delegates approves selection plan, (1937) 20-244.
Progress report—Ore. and Utah plans, (1937) 20-242.
Judges not to blame for political dependence, (1937) 20-245.

### Articles in Other Journals

Report of N. Y. State Bar Assn. Vol. 56, (1933) pp. 193-285, also 44-65.
Selection and Tenure of Judges in Ohio (A Symposium), 8 U. Cin. L. Rev., (1934) 359-519.
Judicial Selection Current Plans and Trends, by Charles T. McCormick, (1935) 30 Ill. L. Rev. 446-468.

Appointment of Judges. An Analysis of Current Proposals, by Paul H. Sanders, (1936) 22 A. B. A. Jour. 131.

California Votes on Proposition to Change Way of Selecting Judges, by John Perry Wood, N. Y. State Bar Assn. Bul. Nov., (1934) 505.

The Appointment of Federal District Judges, by Kenneth Sears, 25 Ill. L. Rev. 54, (1930).

Appointment of Federal Judges, by Wm. D. Mitchell, 17 A. B. A. Jour. 569, (1931).

Bar's Duty in Selection of Judges, by A. V. Cannon, 36 Com. L. Jour. 8, (Jan. 1931).

The Bar's Opinion on Judicial Selection, by Will Shafroth, (1934) 20 A. B. A. Jour. 529-532.

California or Commonwealth Plan—California State Bar Jour., April and May 1932; March, April and May 1933.

The Selection of Judges by E. Hinton, Cleveland Bar Association Plan, (1927) 21 Ill. L. Rev. 612, (Feb. 1927).

Report of Committee of Cleveland Bar Association on Method of Selecting Judges, March, 1933. Available on request to the American Bar Association, 1140 N. Dearborn Street, Chicago, Illinois.

Debate on Judicial Selection, 19 A. B. A. Jour. 670, (1933).

Elective Method of Judicial Selection and Proposed Remedies, by Paul V. McNutt, (1934) 20 A. B. A. Jour. 636.

Georgia Plan of Judicial Selection, Vol. XVI Jour. Am. Jud. Soc., p. 41, (Aug. 1932).

Independence of the Judiciary, by Scott M. Loftin, A. B. A. Annual Report of 1935, p. 274; also 21 A. B. A. Jour. 469.

The Judicial Office and the Bar's Responsibility, by Henry K. Jessup, 13 A. B. A. Jour. 177 (1927).

Judicial Personnel, by Rodney L. Mott, Spencer D. Albright, Helen R. Semmerling—Annals of the American Academy of Political and Social Science, May 1932, p. 143.

Judicial Selection (A Symposium), A. B. A. Annual Report of 1934, p. 225.

Methods of Selection of Judges, by W. F. Willoughby (Willoughby Principles of Judicial Administration), Washington Brookings Institute, 1929, p. 361.

Methods of Selecting and Retiring Judges in a Metropolitan District, by Albert M. Kales Annals of the American Academy of Political and Social Science (No. 141).

A Non-Partisan Judiciary, by Dean Robert L. Stearns, (1936) 7 Mo. B. Jour. 253.

A Non-Political Veto Council on Judicial Character and Fitness for Those About to Be Nominated or appointed to the Bench, by Hon. Edward R. Finch, (1934) 20 A. B. A. Jour. 144. Cf. also Discussions, pp. 246, 383.

Pensions for Judges, 27 Mich. Law Rec. 134, (Dec. 1928).

Problems of Judicial Selection, 19 A. B. A. Jour. 280, (1933).

The Role of the Bar in Electing the Bench in Chicago, by Edward M. Martin, published by the University of Chicago Press, p. 385.

Selecting Judges, by John W. Davis. A Radio Address published by the University of Chicago Press.

The Selection of Judges, by Martin Conboy, 2 N. Y. Univ. L. Rev. 27, (1925).

Selection of Judges, by D. C. Woods, 19 A. B. A. Jour. 187, (1933).

Selection, Tenure and Retirement of Judges, by Evan H. Haynes, 7 Cal. State Bar Jour. 108, (1932).

The Selection, Tenure, Retirement and Compensation of Judges in Ohio, by Francis R. Aumann, 5 U. Cin. L. Rev. 408, (1931).

State Bar Activity in Field of Judicial Selection, by Will Shafroth, (1935) 21 A. B. A. Jour. 86.

Technique of Judicial Appointment, by Harold J. Laski, 24 Mich. L. Rev. 529, (1926).

What Aid Can the Bar Render in the Selection of Judges, by Luther Ely Smith, 18 A. B. A. Jour. 505, (1932).

---

## Law Students Should Learn More Than Legal Rules

However difficult the task of illuminating for the student the nature of his times and the relationship of the law to society, the task of acquainting him with the living processes of the administration of justice, and with what needs to be done to improve it, is a relatively easy matter and one with which many law schools have begun to concern themselves. Every young lawyer should be made aware, at some point in the educational process, of those defects in the administration of justice which are most frequently subjected to criticism, and of the currents of reform which have already been set in motion by public-spirited lawyers, bar associations and other groups within the profession. He ought, before he plunges into the maelstrom of practice, to acquire an objective and dispassionate view of the expense, delay and cumbersomeness of much of our litigation, the haphazardness and inefficiency of much of our court organization, the frequently unsatisfactory methods of selecting judges, the general weakness of criminal law enforcement, the generally antiquated treatment of criminals, the violations, here and there, of constitutionally protected civil liberties, the evil results to the public of unauthorized practice on the one hand and weak disciplinary machinery on the other, the special problems created by the multiplication of administrative tribunals, and so on.

He ought to know all these things and he ought to know also that changes, developments, and reforms have taken place and are being projected abroad and in our own country, and what the bar is doing through integration, special committees, and such groups as the American Bar Association, the American Law Institute, and the American Judicature Society, to tackle the problems which have got to be tackled for the sake alike of the profession and of society.

---

Extract from the address by Dean Lloyd K. Garrison, University of Wisconsin Law School, as part of a symposium on Character Training of Law Students, A. B. A. Convention, August 25, 1936.

# Bar Association Activities

**Published in Cooperation with the Section of Bar Organization Activities of the American Bar Association**

## California Bar Progress in Admission Standards

The California State Bar, having reached its tenth annual convention in September this year, looks back upon a career of continual struggle for improvements in the administration of justice. Numerous objectives have been achieved, often in opposition to strong interests. One of the hardest problems, that of better preparation for the bar, has yielded to effort only recently.

In 1932 the State Bar appropriated $6,000 for a survey of law schools, which was conducted by Dean Claude Horack and Mr. Will Shafroth. Reports were made on twenty operating "law schools," indicating that some were little better than rackets. The report resulted in action by the State Bar, directing the board of governors to adopt certain new rules and recommend their approval by the supreme court.

A novel proposal was that students be required to register with the State Bar before beginning study, and that those not enrolled in approved schools be required to take an examination in first year studies at the appropriate time. To be approved a school would have to show that less than *sixty* percent of its students have failed in bar examinations over a three year period. The supreme court did not approve the State Bar's proposed rules.

In the last legislature a substantial gain was made. Candidates for the bar must have had two years of college, or its equivalent, or have reached the age of twenty-five before beginning study. This was the best the profession could get from the legislators. But the Bar is required to classify law schools, and students in those not on the approved list will be examined periodically. If *thirty* percent of a school's graduates succeed in final examinations, the school will be placed on the approved list. The requirement is made low at first to enable ambitious schools to raise their requirements.

It would appear at long range that the essential difficulty of improving educational standards in California is due to the fact that virtually no capital is required to start a business which can call itself a law school, and the proceeds are generous. As long as uninformed young people can be induced to pay for inferior instruction this business flourishes. The mere fact that one state has twenty law schools is sufficient condemnation of the system of regulating admissions which has prevailed in California while two-thirds of all the other states have attained proper standards. Some of these advanced states have no law schools at all.

For determined students turned out by inferior schools the bar examinations appear to be a sort of law school extension. Those who require more than two trials to pass are evidently handicapped, but a larger reason for raising requirements is that vastly more students in inferior schools are subjected to a cruel waste of time and tuition.

---

## Institute for Administration of Justice Created by Missouri Bar

With the approval of the Missouri State Bar Association, President Kenneth Teasdale has taken steps to organize the Missouri Institute for the Administration of Justice. A start was made last February by arranging for a conference on criminal justice at the state capital. All legislators were invited to meet with the Bar Association committee on criminal justice. Later authority was given President Teasdale to appoint a committee of lawyers and laymen to plan a "long-term approach to the solution" of existing problems.

Chambers of commerce in more than seventy localities were asked to appoint laymen to the organization committee. With acceptances of about 100 laymen and 50 lawyers plans are made for an organization of the Institute for the Administration of Justice at a meeting to be held this fall.

It will be observed that the proposed title includes more than criminal justice. But it was failure of attempted bar association reforms in the criminal field, in successive legislatures, which proved the need for a broader basis than the legal profession. One of the most elaborate surveys of criminal justice made in any state resulted in a volume of more than 500 pages in 1926. The reformers were confident, but the legislators were—if not adamant—at least skeptical and resistant. Bar committees were unable to convince them.

This advance notice appears to be justified because bar associations have commonly been reluctant to consider other means of approach to legislatures than their own. It is now presumed that not only legislative reforms, but constitutional amendments also, will be necessary. Instances are exceedingly rare, except in California, when a bar association has succeeded in amend-

ing the constitution. Their inability to exert needed influence has prevented attempts and stifled planning in many states. Instances of inviting organized lay support are equally rare. And yet, in such important fields as judicial selection and court organization lay interest and support is essential. There must be both submission of the amendment and its adoption by vote —two big battles.

There is no reason for doubting that influential citizens will join and give support to a state institute for the administration of justice. The Missouri plan will afford experience. It appears to offer a route to accomplishment for wise bar proposals. Lawyers have year after year submitted to defeat without appearing to realize that their leadership is not all that is necessary.

### Public Service v. Private Benefit

I think that the underlying cause of this defective administration of justice is that the bar, and the people of the country generally, proceed upon a false assumption as to their true relation to judicial proceedings. Unconsciously, we all treat the business of administering justice as something to be done for *private benefit* instead of treating it primarily as something to be done for the *public service*. A clearer recognition of the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own procedure would tend greatly to make the administration of justice more prompt, inexpensive and effective.—*Elihu Root.*

### Kansas Court Hesitant on Bar Rules

The Kansas Bar Association filed a petition in the supreme court in October, 1936, praying that rules be adopted for the government of the profession. No action having been taken, the Association sought to secure adoption by the legislature of 1937 of a joint resolution "recommending to the supreme court that it promulgate rules for the integration of the bar." The resolution was not adopted.

On submission of these facts in a report by the committee on bar integration at the convention held in September, President John S. Dawson, a member of the supreme court, presented information substantially as follows: that the supreme court directed him to draft tentative rules; that about ten prominent lawyers were invited to advise concerning the draft; that the court thereupon submitted the matter to several district judges, selected by Chief Justice Burch.

Before any further steps were taken the election intervened, Chief Justice Burch was retired, and the Bar Association turned to the legislature.

Justice Dawson's explanation indicates that the court has not denied the petition, but believes that a more hearty interest on the part of the bar is desirable. He said that of 1,850 Kansas lawyers there are 1,400 in active practice, and only 700 members of the Association. His comment on these facts was that "it takes some nerve for one-half to put this over on the other half." Continuing: "There is some very good argument, and some law to the effect that the court has this power. Laying this to one side, it is good to get legislative encouragement." It appeared, when members of the legislative judiciary committees were invited to meet with the committee on integration, that only four of the twenty-six lawyer members of the judiciary committees were members of the State Bar Association. Justice Dawson concluded as follows:

"The supreme court has not acted on this matter. I am telling you where it stands today and I am suggesting this to you: that you do need more of a campaign of education to show that it is an advisable thing to do for our standing and professional ethics, and it will be a good plan to extend to this state an education along this line before we go any further."

Meanwhile the Association is increasing membership. Before the close of the convention the number had grown from 701 to over 900, with all dues paid. With or without legislative concurrence, the proponents appear to have a good chance to persuade the supreme court. In any such situation, the desire of bar association leaders to relinquish their hold on the voluntary organization, and see it changed into a democratically controlled and inclusive bar, should go far to prove their sincerity. Any other proof needed is afforded by the success in states which have had experience.

In Iowa also, where supreme court rules for integration are sought, President Burt J. Thompson is heading a campaign of education. In Nebraska a very large proportion of the entire bar has voted for integration, and supreme court action is awaited.

**The legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often where it should mend. . . The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged.**
*—Benjamin N. Cardozo, J.*

THE OHIO BAR ASSOCIATION failed to get the more than 300,000 names to its petition to amend the constitution by providing an ideal mode of selecting judges. A great campaign for signatures was prosecuted. It is reported that the same petitions will suffice for a second effort. The campaign should not be regretted. As a means to education of the public nothing could conceivably equal it. Tens of thousands of citizens will henceforth understand the problem and its mode of solution, and will be critical of the existing system. They will be able to interpret the thousands of signboards seen along highways, erected to further judicial ambitions. The campaign has also laid bare the arguments of those who oppose, which indicate a need for persistent education of lawyers and especially by local bar associations. Flaunting the old bogeys of judicial tyranny, and exaltation of fasely called democratic principles, cannot avail finally against cold facts.

THE INDIANA BAR ASSOCIATION, after two failures, succeeded in obtaining enactment of its bill delegating rule-making power to the supreme court, and in his president's address on July 9 Mr. Albert H. Cole was able to report that "the supreme court has already taken action to expedite the determination of causes on appeal, and thus within less than thirty days after that bill became a law, we find one of the most common causes of complaint—the weary months and years during which causes have been permitted to drag their way through our courts of error—is now in a fair way to be forever silenced. If the bench and bar measure up to their opportunity and their responsibility there is every reason to believe that the enactment of this law will go far toward bringing about a better system for the administration of justice in Indiana."

COMPARED WITH DOCTORS, lawyers are slow to join. "Doubtless for historical reasons, the bar tends to be centrifugal rather than centripetal," says the editor of the Boston Bar Bulletin, who makes a statistical comparison of the two professions. In 1936 The American Bar Association had 29,008 members and the American Medical Association had 102,801, or 15 percent compared with 60 percent. In 1902 there were 12,553 doctors enrolled. Reorganization effected in 1913 is credited with much of the increased membership. The ABA is now in a position to render service to all lawyers, its only limitation being a restricted income, and increased membership is the natural remedy. Centrifugal or not, it's a shortsighted policy for any legal practitioner to keep for other uses eight dollars which would pay his annual dues.

THE VOLUNTARY DEFENDERS COMMITTEE is highly commended in the Boston Bar Bulletin for the work it has done in its first two years. It employs two attorneys to investigate cases against indigent respondents and to defend when defense is justified. Similar work was sponsored by the Chicago Bar Association for a number of years and until the office of public defender was created. It is fairly common for public services to be first instituted by citizen organizations and later taken over as public charges when they have proved essential. Pumping water and fighting fires are notable examples of such evolution.

JUNIOR BAR MEMBERS of Wake County, N. C., are credited with the following activities: codifying the ordinances of the city of Raleigh; aiding clerk of superior court to improve office practices; seeking more suitable data for bar examinations; drafting minimum fee schedule. Juniors have the fine spirit of men not yet too often licked. In three-fourths of the jurisdictions they will find three-fourths of the profession's assumed work not yet done. They are fortunate in coming on the scene after plans have been made.

WAIVER OF JURY TRIAL in criminal cases has often been dealt with in these columns, and usually with reference to Maryland, where it has been a constitutional right since colonial days. The principle is that respondents should be able to escape local prejudice. Judges in Maryland are certainly less subject to prejudice than jurors, and in certain kinds of offenses popular prejudice has made justice in jury trials difficult, and even impossible. While petty magistrates are often irresponsible there is always assurance that superior court judges will maintain constitutional rights. The latest reference to this subject, in the last preceding number (p. 62), contained a mistake of fact which calls for apology to the Free State of Maryland. Credit for setting a good example was unfortunately given to New Jersey.